(1) 89-258

Supreme Court, U.S.
FILED
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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PETER DEMOSTHENES, Warden, Nevada State Prison,
Petitioner,

v.

JIMMY NEUSCHAFER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether, as a matter of law, a state habeas petitioner's claim that he did not litigate certain claims in his first federal petition because they were unexhausted and thus barred from consideration by this Court's holding in Rose v. Lundy, 455 U.S. 509 (1981), precludes a finding that the petitioner deliberately withheld those claims from his first federal petition and abused the writ when he brought them in a second federal petition.

II. Whether this Court should adopt the plurality approach enunciated in Rose v. Lundy, 455 U.S. 509 (1981), and hold that a petitioner who deliberately sets aside his unexhausted claims in favor of litigating fully exhausted claims in a first federal habeas petition, risks dismissal of a subsequent federal

petition that raises those previously unexhausted issues, because the latter petition constitutes an abuse of the writ under Sanders v. United States, 373 U.S. 1 (1963), Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts, and 28 U.S.C. § 2244(b).

TOPICAL INDEX

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS AND JUDGMENTS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
SUMMARY OF THE ARGUMENT	14
REASONS FOR GRANTING THE WRIT	16
I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF NO LESS THAN FOUR FEDERAL CIRCUIT COURTS OF APPEAL REGARDING THE SAME ISSUE AND, THEREFORE, REVIEW IS WARRANTED UNDER RULE 17.1(a) OF THIS COURT.	16
II. THE LOWER COURT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT AND, THEREFORE, REVIEW IS WARRANTED UNDER RULE 17.1(c) OF THIS COURT.	21
III. THE NEED FOR FINALITY AND ELIMINATION OF PIECEMEAL FEDERAL HABEAS CORPUS REVIEW OF STATE CONVICTIONS ARE COMPELLING REASONS TO GRANT THE WRIT.	25
CONCLUSION	28

TOPICAL INDEX CONT'D:

Appendix A (initial state habeas petition - October, 1985) A-1

Appendix B (district court order-- March 12, 1986). B-1

Appendix C (Ninth Circuit Opinion -- January 6, 1987). C-1

Appendix D (district court opinion -- March 9, 1987). D-1

Appendix E (Ninth Circuit opinion -- May 11, 1987). E-1

Appendix F (district court opinion -- December 8, 1987). F-1

Appendix G (order 2/29/88) G-1

Appendix H (Ninth Circuit Opinion - November 3, 1988) H-1

Appendix I (order denying petition for rehearing and suggestion for rehearing en banc). I-1

Appendix J (28 U.S.C. § 2244(b)) J-1

Appendix K (28 U.S.C. fol. § 2254, Rule 9(b)) K-1

TABLE OF AUTHORITIES

CASES	Page
Amadeo v. Zant ___ U.S. ___, 108 S.Ct. 1771 (1988)	19
Arango v. Wainwright 716 F.2d 1353 (11th Cir. 1983)	18
Barefoot v. Estelle 463 U.S. 880 (1983)	27
Dukes v. Wainwright 769 F.2da 504 (8th Cir. 1985)	17
Hill v. Lockhart ___ U.S. ___, 106 S.Ct. 366	25
Jeffers v. Sargent 842 F.2d 1008 n.2 (8th Cir. 1988)	17
Jones v. Estelle 722 F.2d 159 (5th Cir. 1983)	17
Jones v. Hess 681 F.2d 688 (19th Cir. 1982)	17
McCorquodale v. Kemp 832 F.2d 543 (11th Cir. 1987)	18
Neuschafer v. McKay 807 F.2d 839 (9th Cir. 1987)	8
Neuschafer v. State 101 Nev. 331, 705 P.2d 609 (1985)	5
Neuschafer v. Whitley 860 F.2d 1470 (9th Cir. 1988)	2,13,26
Neuschafer v. Whitley 674 F.Supp. 1418 (D. Nev. 1987)	12

TABLE OF AUTHORITIES, CONT'D:

Cases	Page
Neuschafer v. Whitley ___ U.S. ___, 108 S.Ct. 13 (1987)	11
Neuschafer v. Whitley 656 F.Supp. 891 (D. Nev. 1987)	8
Neuschafer v. Whitley 816 F.2d 1390 (9th Cir. 1987)	8
Neuschafer v. Whitley 630 F.Supp. 897 (D. Nev. 1986)	8
Price v. Johnston 334 U.S. 266 (1963)	11
Purnell v. Missouri Department of Corrections 753 F.2d 703 (8th Cir. 1985)	17
Rose v. Lundy 455 U.S. 509 (1981)	14,15,17,19,20, 21,22,24,26,27
Rudolph v. Blackburn 750 F.2d 302 (5th Cir. 1984)	17
Sanders v. United States 373 U.S. 1 (1963)	i,19
Smith v. Atkins 678 F.2d 883 (10th Cir. 1982)	17
Tannehill v. Fitzharris 451 F.2d 1322 (9th Cir. 1971)	17
United States v. Smith 441 U.S. 780 (1979)	26
United States v. Smith 440 F.2d 521 (7th Cir. 1971)	26

TABLE OF AUTHORITIES, CONT'D:

Cases	Page
Woodard v. Hutchins 464 U.S. 377 (1984)	27
CONSTITUTIONAL AND STATUTORY PROVISIONS	
28 U.S.C. § 1254(1)	3
28 U.S.C. § 1291	3
28 U.S.C. § 1331	3
28 U.S.C. § 2241	3
28 U.S.C. § 2244(b)	4,20
28 U.S.C. § 2253	3
28 U.S.C. § 2254	3
28 U.S.C. § 2254, Rule 9(b)	4,20
Nev. Rev. Stat.	
§ 34.720	6
§ 34.740(2)	23
§ 200.010	4
§ 200.030	4
§ 200.033	4
FRAP 43(c)	1
COURT RULES	
Supreme Court Rule 20.04	3

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

PETER DEMOSTHENES, Warden,
Nevada State Prison,
Petitioner,

v.

JIMMY NEUSCHAFER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW PETER DEMOSTHENES,[1] Warden

---

[1] Petitioner Demosthenes, successor in office to Harol Whitley, has been substituted as a party. See Fed.R.App.P. 43(c). Hereinafter, he is referred to as the State, the real party in interest. Jimmy Neuschafer, respondent in this Court, and petitioner-appellant below, will be referred to as Neuschafer.

of the Nevada State Prison, petitioner herein, by and through his counsel, Brian McKay, the Attorney General of Nevada, and files this Petition for Writ of Certiorari.

OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit [hereinafter Ninth Circuit or circuit court] was filed on November 3, 1988, and is reproduced in Appendix H. Neuschafer v. Whitley, 860 F.2d 1470 (9th Cir. 1988). The circuit court's interim Order staying Neuschafer's execution and its Order denying the State's Petition for Rehearing and Suggestion for Rehearing En Banc are reproduced as Exhibits G and I, respectively. The federal district court's opinion which immediately preceded the circuit court litigation is reproduced in Appendix F.

JURISDICTIONAL STATEMENT

The federal district court invoked jurisdiction of Neuschafer's federal habeas corpus petition pursuant to 28 U.S.C. §§ 1331, 2241, and 2254. An appeal was taken by Neuschafer. See 28 U.S.C. §§ 1291, 2253. The opinion of the Ninth Circuit was filed on November 3, 1988. The State timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc on November 17, 1988. The circuit court's order denying the State's petition was filed on June 19, 1989. This petition for writ of certiorari is filed within sixty (60) days after the denial of rehearing by the circuit court. Sup. Ct. R. 20.4. The jurisdiction of this court is invoked under section 1254(1) of Title 28 to the United States Code.

STATUTORY PROVISIONS INVOLVED

Because this action concerns plead-

ings and review of a habeas corpus matter, rules for federal habeas actions are involved. See 28 U.S.C. § 2244(b) (reprinted in Appendix J); Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. fol. § 2254, Rule 9(b) (reprinted in Appendix K).

STATEMENT OF THE CASE

On April 12, 1983, Neuschafer was formally adjudged guilty of the crime of first degree murder and sentenced to death in the First Judicial District Court of the State of Nevada in and for Carson City (hereinafter Carson City District Court or trial court). See Nev. Rev. Stat. §§ 200.010, 200.030, 200.033. The verdict of guilt and sentence of death were returned upon evidence that, on August 18-19, 1981, Neuschafer had strangled Willard Taylor, also known as Johnnie Johnson, another inmate with whom

Neuschafer was incarcerated at the Nevada State Prison, Nevada's maximum security prison.[2] The Nevada Supreme Court affirmed Neuschafer's sentence on direct appeal. Neuschafer v. State, 101 Nev. 331, 705 P.2d 609 (1985).

Following cessation of direct appeal proceedings in the Nevada Supreme Court, the State sought and obtained a new death warrant, to be executed on November 5, 1985. On October 22, 1985, Neuschafer, with the assistance of one of his trial attorneys, filed a pro se, conclusory state court Petition for Writ of Habeas Corpus (Post-Conviction) in the Carson City District Court with the assistance of the Nevada State Public Defender's

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[2] Presently, Neuschafer is serving the first of two consecutive sentences of life without the possibility of parole, imposed in 1976 by the Carson City District Court, for the murders of two teenage girls. State v. Neuschafer, Case No. 35696-A, Carson City District Court.

office. Neuschafer v. Sumner, Case No. 85-01721H, Petition for Writ of Habeas Corpus (Nev. 1st Jud. Dist. Ct., filed Oct. 22, 1985)(reproduced in pertinent part in Appendix A). Nev. Rev. Stat. § 34.720 et. seq. The trial court dismissed the petition without prejudice after admonishing Neuschafer that he should raise all issues challenging the validity of the conviction and sentence.

On October 22, 1985, the Nevada State Public Defender filed a motion for a 120 day stay of execution in order to obtain and review the record, and to determine what issues could then be raised. The trial court declined to enter a stay but appointed the public defender to represent Neuschafer in the habeas matter. The State Public Defender filed an appeal from the denial of the habeas petition and sought relief in the Nevada Supreme Court. The appeal was

denied on November 1, 1985, the day after a state holiday.

Neuschafer then turned to the United States District Court for the District of Nevada. With the assistance of the Federal Public Defender, Neuschafer filed a habeas petition and asked for a stay of execution. On November 4, 1985, the court entered a stay pending the litigation of those exhausted issues which had been presented to the Nevada Supreme Court on direct appeal. The Federal Public Defender was appointed to represent Neuschafer and given until November 25, 1985, to file a supplemental federal petition. As observed by the circuit court, counsel was "cautioned" to raise all possible issues in the supplemental petition because Neuschafer might be precluded from raising them in a later petition.

All three exhausted issues were

considered and rejected summarily by the district court. Neuschafer v. Whitley, 630 F.Supp. 897 (D. Nev. 1986) (Appendix B). Neuschafer appealed to the Ninth Circuit. That court, with then Circuit Judge Anthony Kennedy writing for the majority, remanded the case for an evidentiary hearing on the issue of the validity of Neuschafer's confession and whether he waived his right to counsel. Neuschafer v. McKay, 807 F.2d 839 (9th Cir. 1987) (Appendix C). The district court held a hearing and made specific findings of fact to the effect that Neuschafer had confessed and had reinitiated contact with authorities after first invoking his right to counsel. Neuschafer v. Whitley, 656 F.Supp. 891 (D. Nev. 1987) (Appendix D). The same panel of the circuit court which had remanded the case affirmed the denial of the petition. Neuschafer v. Whitley, 816

F.2d 1390 (9th Cir. 1987) (Appendix E).

Following the cessation of the first federal proceeding, the State again sought and obtained a new warrant of execution on August 4, 1987. At a hearing in the trial court, all attorneys who had previously represented Neuschafer, including the assistant federal public defender who had litigated Neuschafer's case throughout the first federal proceeding, were present. All were discharged by the court and excused at Neuschafer's request.

On August 5, 1987, Neuschafer filed a second pro se state habeas corpus petition which was either conclusory or totally belied by the record. He again sought the appointment of counsel, the State Public Defender. The State Public Defender was appointed and once again sought a stay in order to review the record and to prepare a supplemental

petition. Nothing had been done in the two-year interim by Neuschafer or the State Public Defender to file a non-conclusory state habeas petition. Neuschafer then sought the removal the State Public Defender because of a purported conflict of interest, which request the court granted. However, the court dismissed the petition without prejudice. Once again, an appeal ensued to the Nevada Supreme Court, in which a deputy state public defender purporting to represent Neuschafer's interests sought a stay and further appellate review. Relief was denied by the Nevada Supreme Court.

Neuschafer returned to the federal district court with the assistance of the federal public defender and filed a second federal habeas petition on August 19, 1987, the eve of his execution which was scheduled for 2:00 a.m. on August 20,

1987. The district court granted a stay of execution in order to consider seven new claims, including a conclusory claim of ineffective assistance of counsel, which had not been raised in the prior federal habeas proceeding. The circuit court and this Court declined to vacate the stay. Neuschafer v. Whitley, ___ U.S. ___, 108 S.Ct. 13 (1987).

The State countered with the filing of a motion to dismiss based upon, among other things, abuse of the writ. On November 20, 1987, the district court held an evidentiary hearing. Neuschafer presented no documentary evidence and called no witnesses. Faced with the burden to prove that he had not abused the writ, Price v. Johnston, 334 U.S. 266 (1963), Neuschafer chose to rely on the evidence and testimony in the prior record. The State called Neuschafer to explain why he did not raise the new

claims in the first federal petition. On the advice of counsel, Neuschafer invoked the fifth amendment. The court ruled that the fifth amendment protection did not apply to the questions asked or the proceedings generally. The court then concluded that Neuschafer's refusals to answer were indicia of a deliberate decision on his part to withhold the new claims during the first federal petition. Thus, the district court dismissed the second petition on December 8, 1987, on the ground that Neuschafer had abused the writ. Neuschafer v. Whitley, 674 F.Supp. 1418 (D. Nev. 1987) (Appendix F). Following the denial of his motion for reconsideration, Neuschafer appealed to the circuit court.

At that juncture, the office of the federal public defender was allowed to withdraw and was replaced by Mary Boetsch, an appointed, private attorney.

Neuschafer then purported to waive his right to continue with the appeal. A three judge panel of the circuit court heard oral arguments without the benefit of briefing and then a divided panel ordered the continued entry of a stay of execution pending briefing on the merits of the case. (Appendix G). Following full briefing and without further oral argument, the three judge panel concluded that, as a matter of law, because of the mere fact that Neuschafer had not yet exhausted the several issues raised in his second petition at the time he filed and then litigated his first petition, the abuse of the writ doctrine could not be applied to bar further federal habeas consideration. Neuschafer v. Whitley, 860 F.2d 1470 (9th Cir. 1988) (Appendix H). The State sought rehearing and suggested a rehearing en banc, which was denied upon a vote of the majority of the

justices of the circuit court. (Appendix I). The State then successfully moved to stay the issuance of the circuit court's mandate. The State now seeks review of the circuit court's opinion via this petition.

SUMMARY OF THE ARGUMENT

There are special and important reasons why this court should review the decision of the circuit court. The circuit court's decision not to follow the plurality opinion in Rose v. Lundy, authored by Justice O'Connor, conflicts with the opinions of no less than four federal circuit courts of appeal. This was recognized in the circuit court's majority opinion. The conflict centers on whether or not a petitioner may be excused from a finding of deliberate withholding of claims as a matter of law, merely because he had not exhausted certain claims at the time he initiated

and litigated a previous federal habeas corpus proceeding.

Secondly, this Court's disposition of Rose v. Lundy left open an important question of federal law which was not settled at the time but should be at this juncture. Specifically, this Court should decide the issue of whether, when a petitioner proceeds in federal court only with his unexhausted claims and is later found as a matter of fact deliberately to have set aside his unexhausted claims, he risks dismissal for abuse of the writ if a subsequent federal petition raises new issues.

Thirdly, the sound administration of federal court habeas corpus review of state court convictions, including the need for finality and elimination of piecemeal litigation, counsel in favor of granting the petition. As it stands, the holding of the circuit court not only

allows, but virtually ensures, cyclic, piecemeal litigation via the filing of repetitive federal habeas corpus petitions.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF NO LESS THAN FOUR FEDERAL COURTS OF APPEAL REGARDING THE SAME ISSUE AND, THEREFORE, REVIEW IS WARRANTED UNDER RULE 17.1(a) OF THIS COURT.

It is the State's position that the circuit court erred in concluding that, as a matter of law, a federal habeas petitioner is excused from an abuse-of-the-writ finding merely by asserting that, during the course of a prior federal habeas proceeding, he had not fully exhausted certain issues in the state courts, which issues later become the subject of a second or successive federal habeas proceeding. The circuit court erroneously foreclosed a factual inquiry into the actual state of mind of

the petitioner or his counsel as to their reasons, if any, for not litigating issues in a prior federal habeas corpus proceeding. Apparently relying on its outdated, three-judge-panel precedent in Tannehill v. Fitzharris, 451 F.2d 1322 (9th Cir. 1971), and little else, the circuit court rejected the plurality approach first discussed by Justice O'Connor in Rose v. Lundy, 455 U.S. 509 (1981). That approach has been adopted by the Fifth, Eighth, Tenth and Eleventh Circuits. See Rudolph v. Blackburn, 750 F.2d 302, 305 (5th Cir. 1984); Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983) (en banc); Jeffers v. Sargent, 842 F.2d 1008 n.2 (8th Cir. 1988); Dukes v. Wainwright, 769 F.2d 504, 506 (8th Cir. 1985); Purnell v. Missouri Department of Corrections, 753 F.2d 703, 710 (8th Cir. 1985); Jones v. Hess, 681 F.2d 688, 695 (10th Cir. 1982); Smith v. Atkins, 678

F.2d 883, 884 (10th Cir. 1982); McCorquodale v. Kemp, 832 F.2d 543, 545-46 (11th Cir. 1987); Arango v. Wainwright, 716 F.2d 1353, 1355 (11th Cir. 1983).

Therefore, an important question of the interpretation of federal habeas law, which has resulted in conflicting opinions between the four aforementioned circuit courts and the Ninth Circuit requires that this Court resolve this dispute. The Ninth Circuit stands alone in its unique interpretation of federal-abuse-of-the-writ law, notwithstanding the concession in the majority opinion that "we are aware of the problems that this result may create." In essence, the Ninth Circuit's approach to the issue creates a per se legal excuse for a prisoner which is factually and legally unassailable in the face of an abuse of the writ assertion by the state.

This Court's holding in Sanders v. United States, 373 U.S. 1 (1963), merely requires a showing of deliberate withholding. Among other things, in Sanders, this Court included in its assessment of deliberate withholding the possibility that a prisoner would engage in needless piecemeal litigation. Nothing in Sanders, or the respective plurality, concurring and dissenting opinions in Rose, created a rule such as has been fashioned by the Ninth Circuit in this case.

Here, after an evidentiary hearing, the trial court construed certain nonresponses by Neuschafer as factual evidence against him. The district court's factual findings are entitled to deference and may not be overlooked or reversed by an intermediate appellate court unless they are clearly erroneous. Amadeo v. Zant, ___ U.S. ___, ___, 108

S.Ct. 1771, 1776-77 (1988). The Ninth Circuit did not even address the district court's factual findings because it erroneously held that, as a matter of law, Neuschafer's proffered excuse served to counter the State's abuse of the writ assertion.

The circuit court's holding has no support in those few decisions of this Court, including the plurality in Rose, which have construed 28 U.S.C. § 2244(b) and Rule 9 of the Rules Governing Section 2254 Cases in the United States District Court. Its holding concededly conflicts with those in several other circuits and encourages unnecessary and repetitive federal habeas petitions. This Court should resolve the conflict between the circuits.

II. THE LOWER COURT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT AND, THEREFORE, REVIEW IS WARRANTED UNDER RULE 17.1(c) OF THIS COURT.

The plurality in Rose concluded that a prisoner who decides to proceed in an earlier petition only with his unexhausted claims, and deliberately sets aside his unexhausted claims, risks dismissal of subsequent federal petitions. The very fact that some seven years later the state of federal law is still unclear is another reason warranting this Court's reconsideration of the issue. Of course, in Rose, the Court was not directly concerned with the issue before it now. Rather, it focused on the propriety of requiring dismissal of a habeas corpus petition containing issues which may not have been totally exhausted in the state courts. The plurality did not enunciate a rule that,

in all instances, a petitioner who proceeds only with exhausted issues and then attempts to come back for a second or subsequent proceeding is automatically subject to an abuse of the writ bar. Rather, the plurality holding in Rose allows the exercise of discretion by a district court and a factual determination as to whether or not a petitioner has (1) decided to proceed only with unexhausted claims in a first federal petition, (2) deliberately set aside his unexhausted claims and (3) proffered a cognizable legal excuse for not litigating them in the earlier proceeding.

While simple, the efficacy of the plurality holding is philosophically sound. Those states which generally require post-conviction claims (including claims of ineffective assistance of counsel) to be brought in state post-conviction relief proceedings or habeas

corpus proceedings only after cessation of direct appeal, are faced with a Hobson's choice. They may be forced to recognize as valid the filing of a conclusory, facially insufficient state post-conviction pleading by a pro se inmate, which is contrary to state law. See Nev. Rev. Stat. § 34.740(2) (1987) ("If it plainly appears from the face of the petition and any documents and exhibits annexed to it that the petitioner is not entitled to relief, the judge or justice shall make an order for its summary dismissal and cause the petitioner to be notified. . . .").[3] An equally unpalatable choice is the one presented on the facts of this case--that is, allowing a prisoner to proceed in a

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[3] Notably, the federal district court and the Ninth Circuit have allowed this protracted litigation to continue by not simply ruling that Neuschafer's claims of ineffective counsel are conclusory.

first federal habeas petition, during which only those issues raised on a direct appeal are considered. Under the Ninth Circuit approach, if the plurality opinion in Rose is not applied, a second federal habeas corpus appeal would necessarily result after a petitioner, perhaps with a change of counsel, decides to raise the issue of ineffective assistance of counsel as well as other issues which were not the subject of a direct appeal in the state courts. Of course, this would lead to prolonged and multiple federal court reviews which are hardly in the interest of judicial economy or the interests of the people of any of the states whether engaged in capital litigation or not.

The reasoning underlying the decision of the plurality in Rose, that is, avoidance of needless, piecemeal litigation, while obvious and convincing to

many circuits, has concededly remained unsettled by this Court. Therefore, this Court should take this opportunity to reconsider the issue anew and to enunciate the state of the law pertaining to abuse of the writ principles.

III. THE NEED FOR FINALITY AND ELIMINATION OF PIECEMEAL FEDERAL HABEAS CORPUS REVIEW OF STATE CONVICTIONS ARE COMPELLING REASONS TO GRANT THE WRIT.

A third reason, which is substantially based upon two policy considerations -- the need for finality and judicial economy -- also counsel in favor of granting certiorari in this case. In a slightly different context, this Court has observed that "every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice." Hill v. Lockhart, ___ U.S. ___, ___, 106 S.Ct.

366, 370 (1985) quoting United States v. Smith, 441 U.S. 780, 784 (1979); United States v. Smith, 440 F.2d 521, 528-29 (7th Cir. 1971) (Stevens, J., dissenting).

The circuit court was obviously aware that its decision was the seed bed for "potential problems," when it recognized that Neuschafer (and presumably other capital litigants) "will have every incentive to think up new and unexhausted claims in order to avoid the penalty which the jury imposed." Neuschafer v. Whitley, 860 F.2d at 1477. Despite the mischief that its decision portended, the circuit court apparently refused to reverse itself and instead relied on precedent which neither the district court nor either of the parties to this case even cited to the circuit court as important, controlling, dispositive or in any way relevant to the holding in the

case. Neuschafer, like other death row prisoners, has an obvious interest in delaying court proceedings for no other purpose than delay itself. The State has an interest in preventing such delay. Barefoot v. Estelle, 463 U.S. 880, 895 (1983).

The need for finality of litigation and judicial economy are compelling if not totally overriding policy interests which are largely undercut by the decision below. In the estimate of the State, the decision below will do nothing but add to the tactical arsenal of prisoners under sentence of death who, typically, with or without the assistance of counsel, utilize last minute abusive filings in order to ward off the ultimate penalty. See, e.g., Woodard v. Hutchins, 464 U.S. 377 (1984).

Left undecided, the Ninth Circuit's holding virtually ensures an unending

stream of piecemeal federal habeas corpus petitions by state prisoners, especially capital litigants, who recognize that there is inherent delay involved each and every time the federal courts undertake a review of a state court conviction. As it stands, the circuit court's opinion directly and seriously impedes the rational functioning of both the state and federal court systems. This Court should take the opportunity to address the impropriety of the Ninth Circuit's approach, which is wholly inconsistent with any efficient, effective system of justice.

CONCLUSION

For the reasons stated above, the petitioner asks that a writ of certiorari to the United States Court of Appeals for the Ninth Circuit issue and that the decision of the Ninth Circuit of Appeals

be reversed.

Respectfully submitted.

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APPENDICES

APPENDIX A

No. 85-01721H

IN THE FIRST JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

JIMMY NEUSCHAFER,	)	
	)	
Petitioner,	)	PETITION FOR
	)	WRIT OF HABEAS
vs.	)	CORPUS
	)	
GEORGE SUMNER, Warden Nevada State Prison,	)	
	)	
	)	
Respondent.	)	
	)	

INSTRUCTIONS: . . .

12. Has any ground being raised in this petition been previously presented to this or any other Court by way of petition for habeas corpus, motion or application? If so, identify:

(a) Which of the grounds is the same: "Violation of my 5th & 6th Amendment Rights."

(b) The proceedings in which these grounds were raised: "At Trial in the First Judicial District Court."

13. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground one: "Federal and State Constitution violations my 5th and 6th Amendment rights."

Supporting facts (Tell your story briefly without citing cases or law): "I was denied counsel after I requested an attorney and subsequently made incrimination (sic) statements."

(b) Ground two: "There may be other grounds when I get a lawyer who has further knowledge of these matters."

Supporting facts (Tell your story briefly without citing cases or law):

_____

_____

_____

. . .

14. If any grounds listed in No. 13 (a), (b), (c) and (d) were not previously presented in any other Court, State or Federal, state briefly what grounds were not so presented, and give your reasons for not presenting them: "When counsel is appointed I will be better able to answer this question, but I believe that ground stated in (a) was persented (sic)." . . .

EXECUTED at The Nevada State Prison on the 22nd day of October, 1985.

/s/ Jimmy Neuschafer
Signature of Petitioner
Address: P.O. Box 607
Carson City, NV 89701

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Jimmy NEUSCHAFER, Petitioner, v. Harol WHITLEY, Warden of the Nevada State Prison, and Brian McKay, Attorney General of the State of Nevada, Respondents.	Case No. CV-R-85-590-ECR

March 12, 1986

ORDER

EDWARD C. REED, Jr., District Judge.

Jimmy Neuschafer was convicted of the first degree murder of Johnnie Johnson,[1] a fellow inmate at the Nevada State Prison. The jury sentenced him to death. After exhausting his state remedies, he filed this petition for writ of habeas corpus on November 4, 1985. At a hearing on November 4, 1985, this Court

ordered the execution stayed, which had been scheduled for 2:00 a.m. on November 5, 1985, and appointed the Federal Public Defender to represent Neuschafer. We also allowed an amended petition for habeas corpus to be filed. After a careful review of the entire record and a consideration of the claims which Neuschafer has presented to this Court, we deny the petition.

I.

Neuschafer and the victim, Johnnie Johnson, were housed in the "S" wing of Unit 5 in the Nevada State Prison (maximum security) in Carson City in August 1981.[2] Inmates housed in "S" wing could not leave the wing and inmates from other sections of the prison could not enter it. Prison regulations in effect in August 1981 permitted only two men to be out of their cells and in the wing common areas at one time. Cells in the "S" wing

were locked and unlocked by remote control by guards stationed in a glass walled control room. The guards could see parts of the wing directly and other parts by video cameras. Guards communicated with inmates in the wing by intercom.

Johnnie Johnson was the wing porter for the "S" wing. The wing porter kept the wing clean, served meals, and passed out supplies to the other inmates. The wing porter was permitted to be out of his cell all day. Other inmates, one at a time, were released from their cells for an hour or two a day. Thus, only one inmate besides Johnnie Johnson was allowed out of his cell at any given time.

On August 18, 1981, at 7:30 a.m., Johnnie Johnson was released from his cell. Ten minutes later Neuschafer was released from his cell. Neuschafer, as

he had on previous occasions, helped Johnson serve breakfast to the other inmates that morning. Inmate Frederick Heimrich, who was housed next to Johnson's cell, testified that sometime later that morning he heard Neuschafer and Johnson arguing over "somas." Somas were prescription pain pills Neuschafer was given for his headaches. The gist of the argument was that Johnson had paid Neuschafer for some of the somas but Neuschafer then had refused to give the pills to Johnson. Some time later, Heimrich and inmate Gregory Barren heard Johnson enter his own cell and Neuschafer follow him. Barren then heard a thud against the wall of Johnson's cell and the squeak of bed springs. According to Barren, when Neuschafer returned to his own cell, he told Barren that he had killed Johnson.

Heimrich testified that when

Neuschafer came out of Johnson's cell he hung a blanket over the doorway. At 9:30 a.m. Neuschafer had himself locked into his cell and told the guard to release Heimrich. After Heimrich was released, he took a note to Johnson. Johnson was lying on the floor of his cell. Inmates often sleep on the floor when they don't like their beds and Heimrich testified that he thought Johnson was asleep. Around 11:00 a.m. Neuschafer told Heimrich to report Johnson as a "man down." A man down meant that an inmate was either sick or injured in his cell. Heimrich informed the prison guards over the intercom that there was a man down.

Responding to the report, the guards entered the wing and removed the blanket from over the doorway of Johnson's cell. They found Johnson lying on the floor, tightly wrapped in a sheet from his neck to his ankles. A noose made of braided

strips of bed sheets was around his neck. The noose or ligature was so tight that the skin bulged on either side of it and the guard had to use a pocket knife to cut if off. A criminologist testified that the strips of sheet making up the portion of the ligature around Johnson's neck were made of cotton and were consistent with the torn cotton sheets found in Neuschafer's cell. The sheets in Johnson's cell were polyester and cotton.

The guards attempted to resuscitate Johnson. He was taken by ambulance to a hospital in Carson City. Johnson died the next day due to a shortage of oxygen to his brain caused by the ligature around his neck. A pathologist testified that there was blood in Johnson's spinal cord indicating that his neck had been snapped back with some force.

At 5:45 p.m. on August 18, 1981, inmate Douglas Robinson gave a note to

correctional officer Sonya Turek. Robinson testified that Neuschafer had given him the note with instructions to give it to the authorities. The note read: "To Whom It May Concern, I did something bad to Johnnie Johnson this morning so some and get me. Sincerely, Jimmy Neuschafer." At 8:51 p.m. that same day, inmate Barren handed another note to Turek. Barren testified that he had written a note to Neuschafer asking what had happened to Johnson. Neuschafer wrote back after ripping off the top of the paper with Barren's question on it. Barren delivered to Turek what Neuschafer had written: "It started by him taking things first. My [illegible] .... And this morning he tried to f--- me. I just couldn't let that happen. So I tried to hang him. Please forgive me. I really feel bad, what I did." A documents expert testified that both notes were

written by Neuschafer. The contents of these notes were read into evidence without objection.

At 6:45 p.m. on August 18, 1981, Neuschafer was interviewed by Rick Ricards and Ed Forrest, members of the prison staff investigating Johnson's death. Neuschafer was advised of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). He requested an attorney. No attorney was provided. The interview, however, continued and Neuschafer made an incriminating statement. The defense successfully moved to have this statement excluded at trial.

Following this interview, Neuschafer was placed in solitary confinement. Between August 18 and August 21, 1981, Neuschafer sent a note to the prison authorities. When questioned under oath, Neuschafer could not recall whether or

not this note had contained a request to talk to investigators about the murder. Ricards set up an interview between Neuschafer and Detective Michael Efford of the Carson City Sheriff's Department. Ricards was told that Neuschafer wanted to talk to the police. Efford was told that Neuschafer had asked to talk to him. Neuschafer, however, stated that he did not request the interview. Efford was not told told that Neuschafer had been previously interviewed and had requested an attorney. At the interview on August 21, 1981, Efford read Neuschafer his Miranda rights. Ricards and Forrest were also present. Neuschafer indicated that he understood them and did not request an attorney. He proceeded to give another incriminating statement. This statement was read into the record at the trial over objections by defense counsel.

The jury found Neuschafer guilty of

first degree murder. At the penalty hearing, the State presented evidence that Neuschafer had been convicted in May 1976 of raping and murdering two teen-age girls. Neuschafer was serving the first of two consecutive life sentences without parole when Johnson was killed. After the penalty hearing, the jury returned a verdict finding three aggravating circumstances: (1) that the murder was committed by a person under a sentence of imprisonment; (2) that the murder was committed by a person who was previously convicted of another murder; and (3) that the murder involved torture, depravity of mind or mutilation of the victim. The jury found no mitigating circumstances and sentenced Neuschafer to death. Neuschafer objects to the judgment of conviction, the death sentence, and the proportionality review conducted by the Nevada Supreme Court.

II.

Neuschafer presents three claims in his petition for writ of habeas corpus. One challenges his conviction only, two challenge his death sentence only. The claim challenging his conviction is that the admission into evidence of the second statement violated the fifth and fourteenth amendments and the rule of Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), because it was taken after Neuschafer requested a lawyer. The two claims challenging Neuschafer's death sentence are: (1) that the jury erred by finding that the murder involved torture, depravity of mind or the mutilation of the victim; and (2) that the Nevada Supreme Court's review of the proportionality of the death sentence in this case was inadequate and thereby violated Neuschafer's right to due process.

This Court carefully considered those factors which would require an evidentiary hearing. See Townsend v. Sain, 372 U.S. 293, 312-313, 83 S.Ct. 745, 756-57, 9 L.Ed.2d 770 (1963). The record before this Court adequately provides the necessary information and, thus, no evidentiary hearing is required.

III.

[1] Neuschafer first contends that his conviction was unconstitutional because the trial court erred by admitting his August 21, 1981, statement into evidence. Neuschafer argues that although he did not request an attorney at his second interview on August 21, his August 18th request for an attorney carried over and applied to the second interview. He concludes that under Edwards v. Arizona, the second incriminating statement should have been suppressed.

In Edwards, Edwards was arrested, taken to the poice station, and interrogated. When he requested counsel, the interrogation stopped, and he was confined to the county jail. The next day, before counsel was appointed, two detectives came to the jail and asked to see Edwards. The jailer told Edwards that he had to talk to the detectives. The detectives advised Edwards of his Miranda rights, and he told them he was willing to make a statement without the presence of counsel, which he did. The Supreme Court held that Edwards' conduct did not amount to a waiver of his right to the presence of counsel. Specifically, the Court held:

> "[W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by

> showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards, 451 U.S. at 484-85, 101 S.Ct. at 1884-85 (footnote omitted).

A Supreme Court plurality recently noted that the Edwards' inquiry is not mechanical, but rather "'... whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances.'" Oregon

v. Bradshaw, 462 U.S. 1039, 1045, 103 S.Ct. 2830, 2834-35, 77 L.Ed.2d 405 (1983) (quoting Edwards v. Arizona, 451 U.S. at 486, n.9, 101 S.Ct. at 1885-86, n.9) (emphasis in Bradshaw). Further, according to the plurality, a two-step analysis is required to determine whether a suspect who invoked his right to counsel later waived his rights. Id. 462 U.S. at 1045-46, 103 S.Ct. at 2835. The court must determine whether the defendant "initiated" further communications with police and, if so, whether under the "totality of the circumstances" the waiver is shown to be knowing and intelligent. Id. Accordingly, the Court will first examine whether the evidence demonstrates that Neuschafer initiated further communication with the authorities.

In Bradshaw, the Supreme Court ruled that an accused person had initiated a

conversation with police, thereby effectively waiving his previously-invoked Fifth Amendment right to counsel during custodial interrogation. In that case, the accused's inquiry of police officers: "Well, what is going to happen to me now?" was held to be sufficient to evince a willingness on his part to open up a "generalized discussion" relating directly or indirectly to the investigation. Id.

Although Neuschafer testified on direct examination that he did not request a second interview, he admitted on cross-examination that he had sent a note to prison authorities, but that he couldn't recall whether or not he made any request to talk to the investigators of the murder. The investigators testified that the second interview was set-up on request of Neuschafer. The record finally supports a conclusion that

Neuschafer expressed a desire to speak to the authorities. A specific note to the prison authorities that Neuschafer wished to speak to the investigators would be sufficient to evince a willingness to discuss the case. See Id.

Next, the Court must examine whether, under the totality of the circumstances, Neuschafer knowingly and intelligently waived his right to counsel. Neuschafer testified at the hearing held outside the presence of the jury that he understood that he did not have to talk to Efford. He also stated that he remembered some of the specific Miranda warnings. Neuschafer also clearly established that he did not request an attorney at this interview. Although Neuschafer did request an attorney during the first interview, he made no such request during the second and did not cut off interrogation. Neuschafer is no

stranger to the criminal justice system. He knew that he could request an attorney but waived that right voluntarily and intelligently.

Therefore, the Court concludes that Neuschafer's custodial statements were not obtained in violation of his constitutional rights. The writ of habeas corpus is accordingly denied as to his first claim for relief.

IV.

[2] Neuschafer next argues that one of the aggravating circumstances found by the jury is not supported by the evidence. As we understand his argument, Neuschafer claims that because the jury found that the murder "involved torture, depravity of mind or the mutilation of the victim" and that all murders are arguably depraved, there was no showing in this case that there was more depravity than other murder cases where

no death penalty was imposed. Thus, Neuschafer argues, the imposition of the death sentence was arbitrary and capricious and unconstitutional.[3] This argument is without merit.

The jury found three aggravating circumstances: (1) that the murder was committed by a person under sentence of imprisonment; (2) that the murder was committed by a person who was previously convicted of another murder; and (3) that the murder involved torture, depravity of mind or the mutilation of the victim. Additionally, the jury did not find that there were any mitigating circumstances. Nevada law provides that upon the affirmative finding of any one aggravating circumstance and the absence of any mitigating circumstance, the death penalty may be imposed. NRS § 200.030(4)(a).

According to Zant v. Stephens, 462

U.S. 862, 103 S. Ct. 2733, 77 L.Ed.2d 235 (1983) and Wainwright v. Goode, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983) (per curiam), as long as one valid statutory aggravating circumstance exists, a federal habeas court should not grant relief unless the evidence or factor in question was unconstitutionally inappropriate. Neuschafer does not argue that the jury's findings of the first two aggravating circumstances was in error or applied improperly or unconstitutionally. Nor does he argue that the jury erred by failing to find any mitigating circumstance. Thus, because two unchallenged aggravating circumstances existed, this Court need not reach the issue of whether the jury's finding that the murder involved torture, depravity of mind or mutilation of the victim was correct.[4] This claim fails to support habeas relief.

V.

[3] Finally, Neuschafer complains, without citing any specific facts, that the death sentence in this case was constitutionally disproportionate and excessive to the penalties imposed in similar cases. Jimmy Neuschafer's sentence to death for murder is, however, not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. As the Supreme Court recently noted, the state may single out for death penalty consideration certain aggravated murders, and that the imposition of the death penalty in such cases will not be constitutionally disproportionate to cases not presenting statutory aggravating circumstances. See Zant v. Stephans, 462 U.S. at 877, 103 S.Ct. at 2742.

Neuschafer argues that the proportionality review conducted by the Nevada

Supreme Court[5] in his case was unconstitutionally inadequate because the sentence is disproportionate to penalties in similar cases. It is not this Court's function to conduct de novo review of the proportionality of Neuschafer's sentence. See Moore v. Balkcom, 716 F.2d 1511, 1518 (11th Cir. 1983). Rather we review whether the Nevada Supreme Court "properly perform[ed] the task assigned to it under the [Nevada] statutes." Gregg v. Georgia, 428 U.S. 153, 224, 96 S.Ct. 2909, 2948, 49 L.Ed.2d 859 (1976) (White, J., joined by Burger, C.J., and Rehnquist, J., concurring). This Court finds that the Nevada Supreme Court did properly evaluate the imposition of the death sentence on Neuschafer. Accordingly, his claim provides no basis to grant the writ.

VI.

This Court has carefully considered

every claim Neuschafer has presented in his petition for writ of habeas corpus. We are mindful that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.). This Court finds no constitutional error warranting the issuance of the writ of habeas corpus.

IT IS, THEREFORE, HEREBY ORDERED that the petition for writ of habeas corpus is DENIED.

IT IS FURTHER ORDERED that the Order Staying Execution, entered by this Court on November 4, 1985, shall be vacated 30 days from the date of this Order denying the writ of habeas corpus. The Stay of execution shall remain in effect for said period of time in order to permit

Neuschafer to request the issuance of a certificate of probable cause for appeal, file a notice of appeal, and seek a further stay of execution from the Ninth Circuit if he desires to do so.

IT IS FURTHER ORDERED that the official Court Reporter shall prepare a transcript of the hearing held before the Court on November 4, 1985. The transcript shall be prepared and filed within 20 days.

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[1]The victim's given name was Willard Taylor, but we will refer to him as he was better known-Johnnie Johnson.

[2]The facts in the text are taken and adopted from the opinion of the Nevada Supreme Court, Neuschafer v. Nevada, 101 Nev.Adv.Op. 78, 705 P.2d 609 (1985).

[3]Neuschafer asserts that because we do not know whether the jury found torture, depravity of mind or mutilation, this Court should overturn the sentence and remand the case back to the trier of fact to make a better record. Not only does it not matter which the jury found, but in light of our disposition of this issue, we need not determine it.

[4]Even though we do not reach this issue, we note that the evidence supports such a finding. This was more than a simple strangulation. In this case, Neuschafer tore the bed sheets from his own bed and carried them into Johnson's cell, evidencing premeditation. The victim was hit on the side of the head with a chair leg. When the prison guards found Johnson, the ligature had been so tight that it had to be cut off with a knife and the skin bulged around it. Further, the pathologist stated that blood in the victim's spinal cord indicated that his neck had been snapped back with some force. The victim did not die immediately, but the next day. Johnson also struggled and choked on blood in his nose and mouth before being found. The evidence supports the jury's finding.

[5]This Court notes that the Supreme Court recently held that the Constitution does not require a state supreme court to conduct a proportionality review as long as the state's procedures are not "so lacking in other checks on arbitrariness that it would [otherwise] not pass constitutional muster. . . " Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 873, 79 L.Ed.2d 29 (1984). At the time Neuschafer committed the murder, however, the Nevada statutes required a proportionality review.

APPENDIX C

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

Jimmy NEUSCHAFER, Petitioner-Appellant, vs. Brian McKAY,* Attorney General of the State of Nevada, Respondent-Appellee.	No. 86-1909

Argued and Submitted

November 13, 1986

Decided January 6, 1987

*Brian McKay has been substituted for Harol Whitley, Attorney General of the State of Nevada. Fed.R.App.P. 43(c)(1).

Appeal from the United States District Court for the District of Nevada.

Before CHAMBERS, KENNEDY, and HALL, Circuit Judges.

KENNEDY, Circuit Judge:

Appellant Neuschafer appeals from the district court's denial of his petition for habeas corpus, 630 F.Supp. 897. We remand for an evidentiary hearing on whether Neuschafer's confession was obtained consistently with the standards set forth in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

[1] Neuschafer was convicted under Nevada law and sentenced to death for the murder of a fellow inmate. An account of the crime is in the opinion of the Nevada Supreme Court affirming the judgment. Neuschafer v. State, 101 Nev. 331, 705 P.2d 609 (1985). Among other contentions in the habeas proceeding here and in the district court is Neuschafer's assertion that his constitutional rights were violated by use of a confession derived from an interrogation begun four days after he requested a lawyer and none was

provided. Under Edwards, Neuschafer's confession was illegally obtained unless, first, he initiated the interview that led to the confession and, second, knowingly and intelligently waived his right to counsel. Edwards, 451 U.S. at 484-85, 486 n.9, 101 S.Ct. at 1884-85, 1885 n.9; see Oregon v. Bradshaw, 462 U.S. 1039, 1044-45, 103 S.Ct. 2830, 2834, 77 L.Ed.2d 405 (1983); id. at 1048, 103 S.Ct. at 2836 (Powell, J., concurring in the judgment) (noting that all other Justices agree that Edwards requires a two-step inquiry).

The state trial court denied the motion to suppress the confession. The Nevada Supreme Court held that the second part of the Edwards test had been satisfied by the execution of a knowing and intelligent waiver, but did not make the first required finding that Neuschafer initiated the interview. On that point,

the court said:

> The record is unclear whether Neuschafer initiated the communication which led to the ... interview. Evidence suggests that Neuschafer requested to speak to authorities regarding the Johnson murder in a note he wrote and gave to prison employees ....

705 P.2d at 612.

In the instant habeas corpus proceeding, the district court reviewed the state trial record and concluded that it "fairly supports a conclusion that Neuschafer expressed a desire to speak to the authorities." The district court found that no evidentiary hearing was required because the state trial record was adequate to support its decision denying Neuschafer's petition. On its face, that finding conflicts with the characterization given to the state

record by the state's highest court, which called the record "unclear."

[2] In federal habeas corpus proceedings, deference must be granted to the findings of state appellate courts as well as state trial courts. Wainwright v. Goode, 464 U.S. 78, 85, 104 S. Ct. 378, 382, 78 L.Ed.2d 187 (1983); Sumner v. Mata, 449 U.S. 539, 545-47, 101 S. Ct. 764, 768-69, 66 L.Ed.2d 722 (1981). In Sumner v. Mata, the Supreme Court stated that 28 U.S.C. § 2254(d) "makes no distinction between the factual determinations of a state trial court and those of a state appellate court." 449 U.S. at 546, 101 S.Ct. at 769. In Wainwright v. Goode, the Court held that the Eleventh Circuit should not have "substitut[ed] its view of the facts for that of the Florida Supreme Court" where both courts reviewed the same cold record and reached opposite conclusions as to

the factors relied on by the sentencing judge. 464 U.S. at 85, 104 S.Ct at 383. We are instructed to give the benefit of the doubt to a state appellate court's reading of a record on appeal just as we would to a state trial court's findings of fact.

[3] In this case, the state trial court denied Neuschafer's motion to suppress the confession, implicitly finding that Neuschafer had initiated the conversation. See Knaubert v. Goldsmith, 791 F.2d 722, 727 (9th Cir. 1986) (stating that when state court hears motion to suppress and rules on the motion, federal habeas court can assume it found facts necessary to support its ruling). Yet the state's highest tribunal reviewed the record and was unwilling or unable to hold squarely that Neuschafer initiated the conversation with the authorities. In consequence, the district court was

presented with conflicting, or at least inconsistent, conclusions by two state courts on the critical point in the case. It could not render a decision on the record before it without second-guessing at least one state tribunal.

We decline to hold that in every case a state trial record will never support a factual determination if a state appellate decision is inconsistent with it; but in the circumstances of this case, we believe an evidentiary hearing in the district court is warranted to resolve the issue whether Neuschafer initiated the conversation that led to his confession. See Townsend v. Sain, 372 U.S. 293, 319, 83 S.Ct. 745, 760, 9 L.Ed.2d 770 (1963) (stating that state record must reveal "full and fair ... evidentiary hearing resulting in reliable findings") (emphasis added); Richmond v. Ricketts, 774 F.2d 957, 961 (9th Cir.

1985) (noting that Townsend controls issue of when evidentiary hearing should be held). Neuschafer alleged serious error, of constitutional dimension. The state did not produce a note sent by Neuschafer in which, the state claims, Neuschafer requested the second interview with the officers, even though these events were after the decision in Edwards [sic] had put state officials on notice that the identity of the party initiating the interview was of paramount importance. A loss of the note would not be fatal to the state's position, but the testimony about its contents is critical.[1]

The district court should hold an evidentiary hearing to determine whether Neuschafer initiated the interview and whether the standards of Edwards were met. The hearing should be completed within sixty days, if consistent with the

other calendar responsibilities of the district court. The transcript of proceedings and the trial court's findings and ruling shall be forwarded to this court and become part of the record on appeal. A party seeking to challenge the district court's findings may request this panel for an order permitting supplemental briefs. Subject to the limited remand here ordered, this panel retains jurisdiction of the case.

REMANDED.

CHAMBERS, Circuit Judge, dissenting.

If there be error in the record before us, I find it harmless. All I may say will not change the mind of any judge on the panel.

My Sister and Brother, I cannot believe that they think there is any doubt as to Neuschafer's guilt. I read the majority as simply saying our district judge can make a better record and

should not indulge in a gamble by one of our en bancs or risk the Supreme Court handling the case now. We cannot escape either. My belief is that a remand will only delay the conclusion of the case. Also, I believe we ought to get the case to the Supreme Court right now.

Now for a little musing:

America seems to have lost its former demand that the death penalty be enforced and promptly in those cases where it is appropriate. So, as a voter at the polls, I would vote against the penalty, likewise if I were a legislator. Of course, it is reaching the point where the death penalty does become a life sentence and the death rate from old age will be the cause of death for most of those under death sentences.

But I do fear the public is getting aroused. We may see a lot of blood letting such as we have had in California

recently and community indignation may slip over to witch hunts. Witchcraft usually has a longer life than community indignation.

From the Nevada Supreme Court's opinion, (1985) 101 Nev. 331, 705 P.2d 609, I conclude there are two notes written by Neuschafer which were entirely unsolicited, and they went into the record of the state trial court without objection. These are enough to convict him and justify the penalty without more. The interviews that involved the notices objected to on the basis of Miranda are just an instance of the prosecution's overtrying its case.

Also, there is other independent evidence admitted which fortifies the notes.

So, I dissent.

[1]We are reluctant to conclude that any possible error was harmless because the state trial record has not been made part of the record on appeal, and we have not reviewed it in all of its detail.

APPENDIX D

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Jimmy NEUSCHAFER, Petitioner, vs. Harol WHITLEY, et al., Respondents.	Case No. CV-R-85-590-ECR ORDER

March 9, 1987

EDWARD C. REED, Jr., Chief Judge.

By its order filed January 6, 1987,[1] 807 F.2d 839, the Ninth Circuit Court of Appeals has remanded this case to this Court to hold an evidentiary hearing and to make written findings and a ruling as to whether:

(a) Petitioner initiated the second interview with law enforcement authorities, which resulted in Petitioner's confession of August 21,

1981, which was admitted in evidence at his trial; and

(b) The standards of Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) were met, i.e., did Petitioner knowingly and intelligently waive his right to counsel.

An evidentiary hearing was held before the Court on February 18, 1987. Prior to the evidentiary hearing a pre-hearing status conference was held on February 17, 1987, to settle the prehearing order. At the hearing on February 18, 1987, testimony and documentary evidence were received and the Petitioner was present and testified. The State has met its burden of proof on both of these issues, see Edwards, supra, at 485, 101 S.Ct. at 1885, and has satisfied the Court that Petitioner initiated the second interview and waived his rights.

FACTS

The murder for which Petitioner was convicted occurred in the Nevada State Prison on August 18, 1981. The victim's body was found in his cell at approximately 11:00 a.m. that morning. At about 5:45 p.m., Petitioner handed a note to a fellow inmate, Douglas Robinson, with instructions to give it to the authorities. Robinson in turn passed the note on to correctional officer Sonya Turek. This note read: "To Whom It May Concern, I did something bad to Johnnie Johnson this morning so come and get me. Sincerely Jimmy Neuschafer." At 8:51 p.m. the same day, inmate Barren handed to Turek a second note from Neuschafer. This note read: "It started by him taking things first. My [illegible] . . . . And this morning he tried to f-k me. I just couldn't let that happen. So I tried hang him. Please forgive me. I really feel

bad, what I did." These notes were read into evidence at Petitioner's trial without objection.

At 6:45 p.m. on the same date of August 18, 1981, Petitioner was interviewed by Rick Ricards and Ed Forrest, members of the Nevada State Prison (NSP) Investigation Department. Petitioner was advised of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). He requested an attorney, but none was provided. The interview, however, continued and Petitioner made an incriminating statement. The defense successfully moved at the trial for the suppression of this statement.

Sometime subsequent to this interview Petitioner was moved from Unit 5 of the prison where he had been residing to "Max Unit," which was the maximum security housing unit of NSP. NSP is the maximum

security prison for the State of Nevada. Within the Max Unit, Petitioner was placed in isolation (referred by some as "the hole"). There is no credible evidence that Petitioner sought to contact an attorney or the authorities or to make any telephone calls, after that time up until August 20, 1981, two days later.

Sometime just prior to 8:15 p.m. on August 20, 1981, Petitioner handed a note to correctional officer Stahl who was on duty in Max Unit. Stahl in turn handed this note to correctional officer Glen Blomgren who, as senior correctional officer on duty, was in charge of the unit. Blomgren who was stationed in the security office of the unit, examined the note. Blomgren cannot recall verbatim the specific contents of the note, but he does remember that the note indicated Petitioner's great desire to see somebody in a "position of authority" to talk about why

he was in the Max Unit. Blomgren also remembers that the note indicated an intimate knowledge of the murder weapon used, describing the material of which it was made and the way it was knotted. To Blomgren the note was "confessionary" and involved an inmate murder.[2]

Blomgren took the note and proceeded to Petitioner's cell with the intent to determine the "importance" of it. When he arrived at Petitioner's cell, Petitioner told Blomgren that the Johnson death was not a suicide. He asked Blomgren if the note would get attention.

Blomgren cannot recall the exact date of these occurrences regarding this particular note, but specifically confirms that the note was received around 8:15 p.m. The prison's daily log makes clear, however, that Petitioner's note requesting a meeting with the authorities was de-

livered to Stahl and Blomgren on August 20, 1981.

After the discussion with Petitioner about the note, Blomgren notified the Shift Commander for the prison, Lt. Francis Smith. Lt. Smith (in his own handwriting) documented the receipt of the note in the daily log for that shift of the watch at the prison (Exhibit F):

> "8:15 P M Phone call complete in Max unit.[3] Also c/o Blomgren received a note from Inmate Neushafer (sic) which is being sent to investigations."

The preponderance of the evidence is that the note was then sent directly to the Investigation Division of the Prison and then on to the Carson City Sheriff's office, which (with the assistance of the Investigation Division) investigated major crimes at the prison at that time.

Sometime after the note reached the Carson City Sheriff, officer Ricards of the Investigation Division arranged for an interview between Petitioner and Detective Michael Efford of the Sheriff's office. Ricards had been told that Petitioner wanted to talk to the police. Ricards told Efford Petitioner had asked to talk to Efford. Efford was not told that Petitioner had previously been interviewed and requested an attorney.

At approximately 2:30 p.m., on August 21, 1981, Petitioner was taken from Max Unit to another area in the prison for an interview with Efford, Ricards and Ed Forrest. At the interview Efford read Petitioner his Miranda rights. Petitioner indicated he understood his rights and did not request an attorney. (See Exhibit B.) He proceeded to give another incriminating statement. This statement was read into

the record at trial over objection of defense counsel.

INITIATION

[1] The credible evidence is clear that it was Petitioner who initiated the further communication with the authorities after the August 18, 1981, interview in which he had requested an attorney. There is no credible evidence that the subsequent August 21, 1981, interview occurred for any reason other than Petitioner's request to speak to the authorities. He initiated the further communication with the authorities.

It may further be concluded that Petitioner heard a radio broadcast or some other kind of report sometime during August 19 or 20 which indicated that the authorities may have believed that Johnson's death was a suicide. Petitioner wanted to straighten that out for the authorities so that they would know it was

a murder. Also, he was concerned that the wrong person might be charged for the crime. These things motivated Petitioner to want to explain to the authorities how the murder had occurred.

The transcript of the second interview on August 21, 1981, is further evidence that it was Petitioner who initiated the further contact with the authorities after the first interview where he had asked for an attorney. It may be inferred from Petitioner's explanations, in the course of the second interview, why he had asked to talk to the authorities, and that it was he who initiated the request for the further interview. The transcript of the second interview contains no indication that it was anyone other than Petitioner who initiated the request for the second interview.

While the note Petitioner sent to the authorities on August 20, 1981, has been inexplicably and inexcusably lost, there is strong credible evidence to support the conclusion that the note did request the interview with the law enforcement officials which was subsequently held on August 21, 1987.

WAIVER

[2] The credible evidence indicates that Petitioner knowingly, voluntarily and intelligently waived his rights at the second hearing. Petitioner testified at his trial (outside the presence of the jury) that he understood he did not have to talk to Efford. In addition, Petitioner stated that he remembered some of the specific Miranda warnings. Petitioner had requested an attorney at the first interview on August 18, 1981, but clearly did not request an attorney at the second interview on August 21, 1981. Petitioner

was no stranger to the criminal justice system. He knew he could request an attorney at the interview on August 21, 1981, but he did not do so. In the totality of the circumstances it must be concluded that Petitioner voluntarily and intelligently waived his right to counsel at the interview on August 21, 1981.

These conclusions are supported by the fact that Petitioner's testimony at the evidentiary hearing on February 18, 1987, was not credible. The Court had the opportunity to observe Petitioner's demeanor and manner while testifying and has had the opportunity to consider the impeachment of his testimony by his inconsistent prior statements. The Court has also considered the content of Petitioner's testimony here and at previous hearings. On this and previous occasions it appears that rather than telling the truth Petitioner has frequently given

answers to crucial questions which were simply designed on the spur of the moment to be self serving according to the particular issue believed to be at hand. Petitioner has been impeached. His testimony as to the critical issues involved in this hearing is not to be believed.

The Court in reaching its decision has again reviewed the entire record, but has paid particular attention to the specific testimony and exhibits received at the evidentiary hearing.

The foregoing shall constitute findings of fact and conclusions of law.

This Court therefore finds and rules that:

(a) Petitioner initiated the interview of August 21, 1981, which led to his confession;

(b) Petitioner knowingly and intelligently waived his right to

counsel, with respect to the interview and the confession which he gave on August 21, 1981.

These findings and this ruling, together with the entire record of the case (including but not limited to the transcript of the hearings of February 17 and 18, 1987, and the evidence adduced at the hearing of February 18) shall be transmitted forthwith by the Clerk to the Ninth Circuit Court of Appeals.

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[1]The Mandate was spread upon the records of this Court on January 12, 1987.

[2]Officer Ricards of the Investigation Division of NSP recalls the note as saying that Petitioner "wished somebody to clear up his trouble." There is no credible evidence to support Petitioner's present contention that the note sought an attorney to represent Petitioner.

[3]This statement referred to a telephone call that had been arranged for another inmate, Hartman, by the chaplain and Lt. Smith. Exhibit E also mentions this telephone call. Exhibit E is the log which records movement of inmates,

visitations to the unit, doctors calls, officers on duty and unusual incidents for Max Unit for August 20, 1981.

APPENDIX E

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

Jimmy NEUSCHAFER,	)	No. 86-1909
	)	
Petitioner-Appellant,	)	
	)	
vs.	)	
	)	
Harol WHITLEY, Warden, Nevada State Prison, and Brian McKay, Attorney General of the State of Nevada,	)	
	)	
Respondents-Appellees.	)	

Argued and Submitted April 14, 1987

Decided May 11, 1987

Appeal from the United States District Court for the District of Nevada.

Before CHAMBERS, KENNEDY and HALL, Circuit Judges.

KENNEDY, Circuit Judge:

The appellant Neuschafer seeks a writ of habeas corpus from the United

States courts after the Nevada judicial system has reviewed and affirmed his conviction and sentence. Neuschafer v. State, 101 Nev. 331, 705 P.2d 609 (1985). Neuschafer killed a prison inmate and was convicted of first degree murder with aggravating circumstances as defined by Nevada law. He received the death sentence. Neuschafer's crime was committed while he was serving two life sentences for the rape and first degree murder of two young women. The United States District Court for the District of Nevada denied Neuschafer's petition for writ of habeas corpus, and after we heard oral argument on appeal from that decision, we issued an order of limited remand to the district court for further findings. Neuschafer v. McKay, 807 F.2d 839 (9th Cir.1987). The district court held an evidentiary hearing and made further specific findings of fact and

conclusions of law, and we have reconsidered the appeal upon further oral argument. We now reject petitioner's constitutional arguments and affirm denial of the writ by the district court.

Neuschafer's first argument, and the one that led us to remand the case for further proceedings, is that the prosecution used a confession obtained in violation of the standards set forth in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Edwards bars the use of any confession obtained after the suspect has requested a lawyer, unless the suspect has initiated the interview leading to his confession and has knowingly and intelligently waived his right to counsel before confessing. Id. at 484-85, 486 n. 9, 101 S.Ct. at 1884-85, 1885 n.9.

[1] As explained in our first opinion, the issue before us involves

Neuschafer's statement on August 21, 1981, which was the third of three confessions or admissions that were introduced in evidence. 807 F.2d at 840; see 705 P.2d at 612. Before making the August 21 statement, Neuschafer had written two incriminating notes, which were admitted at trial and which can be characterized as confessions.

Still another statement, made after the notes were written but before the August 21 statement, was obtained in violation of the petitioner's Miranda rights. On August 18, officers Ricards and Forrest questioned Neuschafer in a maximum security unit of the prison. Despite Neuschafer's request for an attorney, the officers did not provide him with counsel. Instead, they continued the interview until they elicited an incriminating statement. This statement was not admitted in evidence.

On August 21, officers Ricards and Forrest, joined this time by officer Efford, again interviewed Neuschafer and obtained the incriminating statement here in issue. We remanded for further findings, noting that counsel was requested at the August 18 interview, so that the Edwards rule must have been satisfied before the statement from the August 21 interview could be admitted in evidence. The district court found that the August 21 interview was initiated by Neuschafer and that the confession was made after a waiver of the right to counsel. Those findings are fully supported by the evidence.

The district court's findings were as follows:

> Sometime just prior to 8:15 p.m. on August 20, 1981, Petitioner handed a note to correctional officer Stahl who was on duty in Max

Unit. Stahl in turn handed this note to correctional officer Glen Blomgren who, as senior correctional officer on duty, was in charge of the unit. Blomgren who was stationed in the security office of the unit, examined the note. Blomgren cannot recall verbatim the specific contents of the note, but he does remember that the note indicated Petitioner's great desire to see somebody in a "position of authority" to talk about why he was in the Max Unit. Blomgren also remembers that the note indicated an intimate knowledge of the murder weapon used, describing the material of which it was made and the way it was knotted. To Blomgren the note

was "confessionary" and involved an inmate murder.[2]

Blomgren took the note and proceeded to Petitioner's cell with the intent to determine the "importance" of it. When he arrived at Petitioner's cell, Petitioner told Blomgren that the Johnson death was not a suicide. He asked Blomgren if the note would get attention.

Blomgren cannot recall the exact date of these occurrences regarding this particular note, but specifically confirms that the note was received around 8:15 p.m. The prison's daily log makes clear, however, that Petitioner's note requesting a meeting with the authorities was delivered to Stahl and Blomgren on August 20, 1981.

After the discussion with Petitioner about the note, Blomgren notified the Shift Commander for the prison, Lt. Francis Smith. Lt. Smith (in his own handwriting) documented the receipt of the note in the daily log for that shift of the watch at the prison (Exhibit F):

"8:15 P M Phone call complete in Max unit.[3] Also c/o Blomgren received a note from Inmate Neushafer (sic) which is being sent to investigations."

---

[2]Officer Ricards of the Investigation Division of NSP recalls the note as saying that Petitioner "wished somebody to clear up his trouble." There is no credible evidence to support Petitioner's present contention that the note sought an attorney to represent Petitioner.

[3]This statement referred to a telephone call that had been arranged for another inmate, Hartman, by the chaplain and Lt. Smith. Exhibit E also mentions this tele-

phone call. Exhibit E is the log which records movement of inmates, visitations to the unit, doctors calls, officers on duty and unusual incidents for Max Unit for August 20, 1981.

The preponderance of the evidence is that the note was then sent directly to the Investigation Division of the Prison and then on to the Carson City Sheriff's office which (with the assistance of the Investigation Division) investigated major crimes at the prison at that time.

Sometime after the note reached the Carson City Sheriff, officer Ricards of the Investigation Division arranged for an interview between Petitioner and Detective Michael Efford of the Sheriff's office. Ricards had been told that Petitioner wanted to talk to the police. Ricards told Efford Petitioner had asked to talk to Efford. Efford was not told that Petitioner had previously been interviewed and requested an attorney.

At approximately 2:30 p.m., on August 21, 1981, Petitioner was taken from Max Unit to another area in the prison for an interview with Efford, Ricards and Ed Forrest. At the interview Efford read Petitioner his Miranda rights. Petitioner indicated he understood his rights and did not request an attorney. (See Exhibit B.) He proceeded to give another incriminating statement. This statement was read into the record at trial over objection of defense counsel.

Neuschafer's claim that he did not initiate the interview is refuted in the record by documentary evidence, by the testimony of officers Smith and Blomgren, and by inconsistent statements of Neuschafer in the remand hearing itself and at the criminal trial. The trial judge said also that Neuschafer's testimony was discredited by his demeanor.

Though we must sustain the findings of fact upon the mere conclusion that they were not clearly erroneous, we are led to say here that the evidence in support of the court's findings is compelling.

Based on the explicit findings of the district court, the conditions of Edwards v. Arizona were satisfied, and the August 21 confession was admissible. It is unnecessary for us to consider the issue of harmless error, although, as the dissent in our previous disposition makes clear, that alternative argument by the state of Nevada is far from insubstantial.

In our previous opinion, we did not address Neuschafer's other contentions, and we now turn to those matters. The jury found that one of the aggravating factors of the crime was that it was a murder which "involved torture, depravity of mind or the mutilation of the victim."

Nev.Rev.Stat. §200.033(8). Neuschafer contends this is an arbitrary standard, both as a general matter and in the particular circumstances of his case. We need not address this contention, however, for it would be of no avail to the petitioner. The jury found additional and specific aggravating factors which, under both Nevada law and controlling constitutional principles, justify imposition of the capital sentence.

The jury found, beyond any reasonable doubt, that the murder had been committed by a person under sentence of imprisonment, and that it had been committed by a person who was previously convicted of another murder, both of which are aggravating circumstances under Nevada law. Nev.Rev.Stat. §200.033(1), (2). The jury found no mitigating factors. In the absence of mitigating factors, the presence of either of the

aggravating circumstances, standing alone, would have permitted the jury to impose the death sentence under Nevada law. Nev.Rev.Stat. §200.030(4)(a).

[2] The presence of one valid aggravating circumstance suffices to support a sentence of death against the contention that another aggravating circumstance is insufficient, standing alone, to support the sentence. Zant v. Stephens, 462 U.S. 862, 880-84, 103 S.Ct. 2733, 2744-47, 77 L.Ed.2d 235 (1983) (upholding death sentence, in spite of presence of invalid aggravating circumstance, for murder committed by escaped convict who had previously been convicted of capital crime.) Neuschafer offers no distinction between his case and the circumstances in Zant v. Stephens, and we can find none. The aggravating circumstances found by the jury are unchallenged, namely commission of the murder

by a person under sentence of imprisonment and by a person who was previously convicted of another murder, and are sufficient to support the sentence. There is no contention that details of the strangulation should not have been brought to the jury's attention in the sentencing phase, nor could there be such an argument under Nevada law. This was a circumstance relevant to the offense which bore on the jury's determination whether to impose the death penalty even assuming it was not in itself an appropriate aggravating factor. Nev.Rev.Stat. §175.552. Zant v. Stephens is squarely applicable here.

[3] Neuschafer argues that his sentence was disproportionate, apparently on the premise that the death penalty has not been decreed in other strangulation cases, and he claims the district court should have provided an evidentiary

hearing on this point. This argument ignores the proposition, explicit in the jury's findings, that the sentence was enhanced on two statutory grounds not related to the means of the killing, grounds which, as we have held, are sufficient to support the imposition of the death penalty. Neuschafer committed the crime while in prison and he had previously been convicted of other murders. There is no showing that Neuschafer's sentence was disproportionate to sentences received by other offenders in these circumstances. The minor premise of Neuschafer's argument, that there is a factual basis for a showing of disproportionality, could not be established, therefore, within the framework Neuschafer offers.

[4] The major premise that a factual showing of disproportionality would require issuance of a writ of

habeas corpus is also flawed. To the extent that Neuschafer's argument is based on Nevada law, he cannot obtain relief in a federal habeas corpus proceeding. Engle v. Isaac, 456 U.S. 107, 119, 102 S.Ct. 1558, 1567, 71 L.Ed.2d 783 (1982); Gutierrez v. Griggs, 695 F.2d 1195, 1197-98 (9th Cir.1983). We note for the record, however, that the Nevada Supreme Court conducted a proportionality review of Neuschafer's sentence as well as a determination that the sentence was not influenced by any arbitrary factors. See 705 P.2d at 613 & n.5. Finally, constitutional principles do not require a state court, or the federal court in habeas corpus proceedings, to engage in any comparative proportionality review, at least where a state's capital sentencing process contains checks on arbitrariness such as the mitigating and aggravating circumstances in the Nevada statute.

Pulley v. Harris, 465 U.S. 37, 50-51, 104 S.Ct. 871, 879-80, 79 L.Ed.2d 29 (1984). There is no valid constitutional or federal objection to the imposition of the capital sentence.

AFFIRMED.

CHAMBERS, Circuit Judge, concurring:

I concur in Judge Kennedy's opinion affirming after the remand. I still adhere to the proposition in my original dissent that the notes or "kites," the contents of which were before us, were enough for affirmance on round one.

APPENDIX F

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Jimmy NEUSCHAFER,	)	Case No. CV-N-87-419-ECR
Petitioner,	)	
vs.	)	ORDER
Harol WHITLEY, et al.,	)	
Respondents.	)	

December 8, 1987

EDWARD C. REED, Jr., District Judge.

The petitioner, Jimmy Neuschafer, has brought this second petition for a writ of federal habeas corpus under 28 U.S.C. § 2254.[1] Initially, the petitioner had decided not to bring the second petition, and the American Civil Liberties Union sought permission to file the petition on his behalf as relator. The Court denied the ACLU's motion to intervene as relator, and declined to issue any stay of execution for the

petitioner. Shortly before the scheduled execution, however, the petitioner decided to present his second petition to the Court. In view of the substantial issues presented by that petition, and in view of the short amount of time in which the Court had to consider those issues, the Court stayed the petitioner's imminent execution. This order was upheld by both the Ninth Circuit and the United States Supreme Court.

The respondents have moved to dismiss the 1987 petition on various grounds, including the abuse of writ doctrine. In view of the fact that this is a successive petition, the Court ordered a hearing to determine whether this second petition indeed constituted an abusive writ. See Richmond v. Ricketts, 774 F.2d 957, 961 (9th Cir. 1985). After consideration of the pleadings on file and the argument and

evidence presented at the hearing, it appears to the Court that this second petition is abusive, and that it should be dismissed on that basis.

THE STATE PROCEEDINGS/1985 PETITION

The petitioner was convicted of the murder of fellow inmate Johnnie Johnson in April, 1983. The jury also imposed the sentence of death upon the petitioner. Several years lapsed before the state supreme court acted on the petitioner's direct appeal. On August 27, 1985, however, that court affirmed the petitioner's conviction and upheld the sentence of death. The petitioner then proceeded in pro se in the state courts, filing a petition for state post-conviction relief soon after the supreme court issued its mandate. The petition apparently argued that Neuschafer's fifth and sixth amendment rights had been violated as a result of

his conviction. The state court judge who heard the petition dismissed it for lack of legal particularity, and also denied the petitioner's motions for appointment of counsel and for stay of execution.

By this time, the state public defender, Robert Bork, filed another petition before the same judge on October 28, 1985. The day after, the Attorney General's office moved to dismiss this petition. On the following day, the state court judge held a brief hearing, at which time he appointed the public defender to represent the petitioner, and dismissed the petition. That afternoon, Mr. Bork filed a notice of appeal to the state supreme court. The court dismissed the appeal and affirmed the judgment of the lower court, thereby clearing the way for the

petitioner's execution, then scheduled for November 5, 1985.

THE FEDERAL PROCEEDINGS/1985 PETITION

In view of the petitioner's imminent execution, the federal public defender, N. Patrick Flanagan, filed a petition for writ of habeas corpus and a motion for stay of execution with this Court. A hearing was held in this matter on November 4, 1985. At that time, the Court appointed Mr. Flanagan to represent the petitioner during the proceedings in this Court. The Court also noted that the petitioner had not yet had the opportunity to pursue any of the federal remedies to which he was entitled. In view of this, the Court stayed the petitioner's impending execution, and directed counsel to file an amended petition. The Court also cautioned the petitioner's counsel at that time that all possible grounds should be included in

that amended petition, in view of the serious problems raised by subsequent petitions.

The petitioner filed the amended petition. The Court, by its order of March 12, 1986, denied the petition in its entirety. Neuschafer v. Whitley, 630 F.Supp. 897, 902 (D.Nev. 1986). The petitioner then appealed that decision to the Ninth Circuit. On January 6, 1987, the circuit remanded the Court's order on the basis that an evidentiary hearing should have been held regarding the petitioner's Miranda/Edwards claim. Neuschafer v. McKay, 807 F.2d 839, 841 (9th Cir.1987). Pursuant to the circuit's order, this Court held an evidentiary hearing on February 18, 1987. At that time, the Court took evidence and testimony regarding whether the petitioner voluntarily initiated his second interview with law enforcement

officials which resulted in his confession. The Court determined that the petitioner had indeed initiated the second contact, and that there was therefore no basis for the Miranda/ Edwards claim. Neuschafer v. Whitley, 656 F.Supp. 891, 893 (D.Nev. 1987). The Ninth Circuit affirmed this ruling. Neuschafer v. Whitley, 816 F.2d 1390, 1392 (9th Cir. 1987). The petitioner never sought review by the United States Supreme Court.

THE 1987 PETITION

The petitioner then returned to the state courts, and filed another post-conviction relief petition. The state district judge heard this matter, as well as a motion for stay of execution on August 17, 1987. At that time, the petition was dismissed, and the motion for stay was denied. The notice of appeal was filed, and the state supreme

court heard the matter on August 19, 1987. The supreme court then dismissed the appeal, and denied the motion for stay. After initially vacillating as to whether he would himself file a second federal habeas corpus petition, the petitioner then returned to this court with his second habeas petition and motion for stay of execution.

The 1987 petition alleges a variety of claims, none of which was asserted in the 1985 federal habeas petition. It appears to the Court, however, that the petitioner is barred from asserting these claims at this date because of his abuse of the writ.

ABUSE OF THE WRIT

Rule 9(b) of the Rules Governing Cases under 28 U.S.C. § 2254 provides that

> [a] second or successive petition may be dismissed if the judge finds

> that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Rule 9(b), Rules Governing Cases under 28 U.S.C. § 2254. The purpose of this rule is to limit the ability of state prisoners to file successive habeas corpus petitions in the federal courts. See Adv.Comm.Note to Rule 9(b), Rules Governing Cases under 28 U.S.C. § 2254.

The Ninth Circuit has had an opportunity to consider the circumstances which constitute an abuse of the writ. In Richmond v. Ricketts, 774 F.2d 957 (9th Cir. 1985), the petitioner had brought two petitions for a federal writ

of habeas corpus. In the first petition, he successfully challenged the Arizona statute under which he was sentenced to death. The district court, in granting the petition, ordered that the petitioner be resentenced. At this second sentencing, the petitioner also received the death penalty under the revised statutory scheme. Id., at 959.

The petitioner then filed a second habeas corpus petition, which challenged the constitutionality of his second sentencing. The district court denied the petition and the stay of execution on several grounds. The circuit court affirmed the portion of the district court's order which dismissed the petition for failure to exhaust, but vacated the portion of the order which denied the petition on the merits. The circuit then remanded with instructions to allow the petitioner to return to

state court to exhaust his state remedies. Once he had exhausted those remedies, the petitioner returned to federal court with an eighteen count petition. The district court denied the petition, finding that the claims in the second petition could have been brought in the first petition, and therefore constituted an abuse of the writ. Id.

The Ninth Circuit reversed. It found that the district court had erred in holding that the new grounds alleged in the second petition should have been brought in the first petition. Id., at 961. "Previously unadjudicated claims," the court noted, "must be decided on the merits unless the petitioner has made a conscious decision deliberately to withhold them, is pursuing 'needless piecemeal litigation' or has raised the claims only to 'vex, harass, or delay.'" Id., (citing Sanders v. United States,

373 U.S. 1, 18, 83 S.Ct. 1068, 1078, 10 L.Ed.2d 148 (1963)).

In this case, the court found that nothing in the record indicated that the petitioner had withheld arguments purposefully in the hope of being granted two hearings instead of only one. Id. In addition, the court noted that the second petition had been filed in response to the resentencing gained as a result of the first petition. The court thus concluded that the petitioner could not be accused of having engaged in piecemeal litigation. Id. Finally, the court noted that the petitioner's purpose in filing the second petition was not to vex, harass or delay, inasmuch as he was challenging in good faith the statute under which he was resentenced to death. On this basis, the court concluded that the district court had wrongly dismissed

these claims on abuse of the writ grounds.

In the present case, the petitioner may fairly be accused of abuse of the writ on the basis that he has deliberately withheld claims. As an initial matter, case law makes clear that the petitioner bears the burden of proof on this issue. In Price v. Johnson, 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948), the Court indicated that "[o]nce a particular abuse has been alleged, the prisoner has the burden of answering that allegation and of proving that he has not abused the writ." Id., at 292, 68 S.Ct. at 1063; see also Adv.Comm.Note to Rule 9(b), Rules Governing Cases under 28 U.S.C. § 2254. The advisory Committee Note and the cases also make clear that the petitioner must be allowed some sort of hearing to explain his alleged abuse, and this Court accorded with that

directive. At that hearing, however, the petitioner failed to meet the burden of proof which the rules place on him.

[1] Petitioner's attorney, N. Patrick Flanagan, chose not to call any witnesses or present any documentary evidence. Instead, petitioner's counsel chose to rely on the evidence and testimony presented in the voluminous records of the petitioner's first habeas corpus petition. In so doing, petitioner's counsel hoped to convince the Court that the first habeas petition was filed under extreme circumstances in an effort to avoid the petitioner's then imminent execution. See supra, pgs. 1419-1420. As noted above, the petitioner contends that he was himself unable to prepare a post-conviction brief, and that the state courts were unwilling to appoint counsel for him. The thrust of counsel's argument is that the petitioner was faced

in November, 1985 with a Hobson's choice: either file a petition with only the unexhausted claims now and get a stay of execution from federal courts; or return to state courts to exhaust state remedies and run the risk of not getting a stay there. Because of this difficult decision, the petitioner contends that he cannot be prevented from bringing these new claims (which were unexhausted at the time of the first petition), as he had to resort to the federal courts in order to stay his execution.

The petitioner's argument is unavailing for several reasons. First, and foremost, the petitioner has failed to prove that he or his counsel did not make a conscious decision to withhold deliberately these latter claims from the 1985 petition. Indeed, the argument which the petitioner propounds, if anything, indicates that he did know of

these claims, but chose deliberately to withhold them for lack of exhaustion. The Court appreciates that petitioner and his counsel felt that they had to resort to the federal courts for a stay, but petitioner has cited the Court no authority for a "duress" exception to the abuse doctrine. On this basis, it appears that the petitioner has failed to bear his burden of proof.[2]

From the evidence which the respondents presented to the Court, it does appear that counsel and the petitioner made a decision to withhold these claims. Initially, the respondents' evidence proved that the present ineffective assistance of counsel claim was asserted by the petitioner himself in the post-conviction brief. Although the state courts ultimately dismissed this claim as insufficient, it is evidence that the petitioner was aware

of the existence of the claim at the time of the first federal habeas. Also, petitioner's counsel stated at the stay of execution hearing on November 4, 1985, that he was aware of the sixth amendment claims. In addition, the respondents showed that the issue surrounding the disqualification of the trial judge had been fully argued in the state proceedings. Experienced, qualified counsel, such as Mr. Flanagan must be assumed to have read the trial record, and must be charged with that knowledge. Thus, it is fair to state that petitioner and counsel were aware of the disqualification issue as well.

Moreover, at the hearing on the stay of execution conducted by this Court on November 4, 1985, the petitioner and his counsel were cautioned to raise all possible grounds for relief in that petition so as to avoid the problems

presented by the successive petitions. The Court further cautioned the petitioner and counsel that subsequent petitions would possibly be subject to dismissal for abuse of the writ. Reporter's Transcript, at pgs. 39-41. Although this evidence is not terribly strong on the issue of the petitioner's conscious decision to withhold issues, it is at least some evidence on this topic.

Finally, the Court notes that the petitioner refused to answer the respondents' questions at the recent abuse of writ hearing relating directly to his state of mind regarding the filing of these claims. The respondents' attorney, Mr. Sarnowski, called the petitioner as his first witness, but petitioner's counsel objected to his taking the stand on fifth amendment grounds. The Court determined that the fifth amendment objection was improperly

asserted, as nothing which the petitioner would testify about in that proceeding could tend to incriminate him in a later criminal proceeding. The Court thus allowed Mr. Sarnowski to question the petitioner with respect to his state of mind regarding these claims. The petitioner, however, adamantly refused to answer any questions from the respondents, despite repeated warnings by the Court. Although the basis for his refusal to answer is not entirely clear, it appears that the petitioner was attempting to rely on the fifth amendment privilege which the Court had found without foundation. Mr. Sarnowski then moved for immediate sanctions in the form of dismissal of the present petition, which motion the Court denied. It does appear, however, that the petitioner's refusal to answer these questions may be used as evidence against him.

The Supreme Court has consistently recognized that silence in the face of an accusation is a relevant fact which is not barred from evidence by the Due Process Clause. See Baxter v. Palmigiano, 425 U.S. 308, 319, 96 S.Ct. 1551, 1558, 47 L.Ed.2d 810 (1976). The basis for this rule is that "[f]ailure to contest an assertion ... is considered evidence of acquiescence ... if it would have been natural under the circumstances to object to the assertion in question." Id., (citing United States v. Hale, 422 U.S. 171, 176, 95 S.Ct. 2133, 2136, 45 L.Ed.2d 99 (1975); cf., Wehling v. Columbia Broadcasting System, 611 F.2d 1026, 1027 (5th Cir. 1980) (invocation of fifth amendment privilege subject to the drawing of an adverse inference in a civil case by the trier of facts. Later cases have imposed even more severe sanctions for failure to answer properly

asked questions. See Baker v. Limber, 647 F.2d 912, 918 (9th Cir. 1981) (order dismissing defendants' counterclaims upheld where defendants' assertion of fifth amendment privilege was in bad faith and without foundation). In view of the more severe sanctions which the Court could properly impose upon the petitioner for refusing to answer questions, drawing an adverse inference of fact is an acceptable sanction.

In this case, the refusal of the petitioner to answer the respondents' questions is most telling. Under the circumstances, it would have been natural for any individual to answer the questions propounded in the negative, so as to attempt to establish the fact that there was no conscious decision on his part to withhold these claims. In this case, however, the petitioner simply refused to answer these questions, which

can and will be used as evidence that he did make such a decision to withhold these claims.

Although the evidence presented by the respondents is not overwhelming, it is sufficient for the Court to find an abuse of the writ. As noted above, petitioner has not presented the Court with any evidence on this issue. As he bears the burden of proof, the Court must find that he has failed to meet that burden, and that he did make a conscious decision to withhold these latter issues deliberately.

[2] The petitioner nonetheless contends that, as a matter of law, it was impossible to pursue these claims in 1985, in that they were not exhausted in state court at that time. Because of the dictates of Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), the petitioner contends that he could not

have filed the then unexhausted claims, for fear that this Court would then be required to dismiss the entire petition. He thus argues that his decision to withhold these claims cannot now bar him from presenting them at this time.

This exact problem was considered in the Rose case. In her opinion, Justice O'Connor noted that the ruling in that case made it tempting for a petitioner to dismiss the unexhausted portion of the petition, with the hope of returning with those deleted claims once exhausted had been pursued in the state courts. Such a petitioner proceeds at his own risk, the Justice cautioned, as Rule 9(b) indicates that he may well be found under such circumstances to have abused the writ. "Thus," concluded Justice O'Connor, "a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks

dismissal of subsequent federal petitions." Id. at 521, 102 S.Ct. at 1305.

Although this portion of Justice O'Connor's Rose opinion garnered only a plurality of votes, a number of other circuits and district courts have adopted the rule. See Rudolph v. Blackburn, 750 F.2d 305 (5th Cir. 1984) (sole fact that petitioner's claim for relief was not exhausted at time of prior federal writ would not excuse failure to include that claim in the prior petition); Jones v. Estelle, 722 F.2d 159, 169 (5th Cir. 1983) (petitioner who persists in the prosecution of federal writ while aware of additional but unexhausted claims faces the burden of disproving abuse of the writ; that the omitted claim was not exhausted at the time of the first petition is not sufficient to avoid the abuse doctrine); Jones v. Hess, 681 F.2d

688, 695 (10th Cir. 1982) (petitioner who deletes unexhausted claim risks forfeiture of the future consideration of that claim as a successive petition); Smith v. Atkins, 678 F.2d 883, 884 (10th Cir. 1982) (quoting from Justice O'Connor's plurality opinion in Rose); cf., Johnson v. Lynaugh, 821 F.2d 224 (5th Cir. 1987) (successive petition would be denied as an abusive writ where petitioner failed to assert in prior petition new grounds raised as basis for habeas relief); Moore v. Blackburn, 774 F.2d 97, 98 (5th Cir. 1985) (claims must be included in prior petition if competent attorney should have been aware of them at the time of the prior petition); Urdy v. McCotter, 773 F.2d 652, 655 (5th Cir. 1985) (petitioner may assert new claims in second petition so long as they are based upon facts or legal theories of which the petitioner

had no knowledge at the time of the first petition); Booker v. Wainwright, 764 F.2d 1371, 1376 (11th Cir. 1985) (dismissal for abuse of the writ may be avoided by showing that the petitioner did not realize that such facts would constitute basis for which federal habeas relief could be granted); contra, Powell v. Spaulding, 679 F.2d 163, 166 (9th Cir. 1982) (petitioner would be able to refile unexhausted claims in a second petition if he chose to do so) (dictum); United States ex rel. Rivera v. Franzen, 564 F.Supp. 723, 725 (N.D.Ill. 1983) (subsequent filing of previously unexhausted claim does not constitute abuse of the writ); Martin v. White, 538 F.Supp. 326, 327 (W.D.Mo. 1982) (rejecting the Rose plurality opinion).

The Ninth Circuit has yet to state its position on this issue affirmatively. In Powell v. Spaulding, supra, pg. 1424,

the court did indicate that it might follow the courts which have rejected the Rose plurality. In that case, the petitioner had been convicted of murder in the Washington state courts. He then brought a petition for a federal writ of habeas corpus, alleging four grounds for relief. After the state filed its answer, the petitioner sought leave to add another claim to the petition. The federal magistrate found that the claim was unexhausted in the state courts, and recommended that the petitioner be denied leave to add it into the petition. The magistrate then recommended that all of the exhausted claims in the petition be denied on the merits. Id., at 165.

The Ninth Circuit affirmed the magistrate's recommendation. It noted first that the Supreme Court in Rose had adopted the total exhaustion rule developed in the Ninth Circuit. Id. By

virtue of this, the court stated further that district courts are required to dismiss petitions containing exhausted and unexhausted claims. Id. In this case, however, the unexhausted claim had never been part of the petition; the petitioner had merely sought leave to add it to the petition. Thus, the court found the magistrate had committed no error in considering the remainder of the petition, inasmuch as the unexhausted claim had never been part of the petition. Id., at 166. In addition, the court added in a footnote, without deciding the issue, that the petitioner might not be barred by the abuse of the writ doctrine if he later sought to assert the unexhausted claim in a second habeas petition. Id., n.5. Thus, it could be argued that the circuit has rejected the Rose plurality, choosing instead to side with the minority

opinion in that case.

This conclusion would be unwarranted, for several reasons. First, and foremost, the court's statement in Powell is dictum. According to the court's own statement in the relevant footnote, it was not deciding the question of whether the second petition would be abusive, in that "[a]ny question regarding Powell's abuse of the writ would [have] to be addressed directly if and when Powell files a second petition...." Id. The court thus reserved decision on the question of whether this conduct constitutes an abuse of the writ. Powell cannot therefore be taken as authority in this matter. See Webster v. Fall, 266 U.S. 507, 511, 45 S.Ct. 148, 149, 69 L.Ed. 411 (1925) Sethy v. Alameda County Water District, 545 F.2d 1157, 1160 (9th Cir. 1976); Mead v. Retail Clerks Int'l Ass'n, 523 F.2d 1371,

1374 (9th Cir. 1975). In addition, the Powell court noted that part of the reason for its statement regarding subsequent petitions was the state's inconsistent position with respect to the exhaustion of the claim at issue. Because the state had apparently argued for exhaustion at one point, and then had reversed course and argued against exhaustion on appeal, the court was unsympathetic to the possible abuse argument by the state.

[3] The court's suggestion in Powell regarding subsequent petitions is therefore not binding upon this Court. As noted above, the Rose plurality has much to recommend for itself. For if that rule is not the law, a habeas petitioner would be able to exhaust his state remedies on his available claims one by one, and file a fairly continuous stream of federal habeas corpus

petitions. Such a result would make a mockery of the federal habeas system. It is important that a petitioner be able to present his claims to the federal courts, and this Court's order does not prevent that in any way. The Court simply states that where a habeas petitioner is aware at the time of the filing of the first federal habeas petition that he has other claims for relief, but fails to add those claims into the first petition, he is subject to abuse of the writ charges.

[4] The petitioner can always avoid the abuse charge by showing that the latter claims were not reasonably available to him at the time of the first petition. He could argue, for example, that the legal basis for the subsequent claims had not been established at the time of the first petition, as subsequent case law established his claim for relief. See Reed v. Ross, 468 U.S. 1, 104 S.Ct.

2901, 82 L.Ed.2d 1 (1984). In addition, he could also argue that the factual basis of the subsequent claim was unavailable to him at the time, owing to the discovery of facts after the filing of the first petition. This list is not exclusive, but it is important to note that the simple fact that the petitioner has not exhausted his state court remedies on a claim does not excuse an abusive writ. The proper course of action for the petitioner in such a case is to dismiss the first federal habeas without prejudice, return to the state court, and exhaust all remedies. Once this is accomplished, the petitioner can then refile the federal habeas with all exhausted claims, without fear of abuse of the writ charges. As a matter of law, therefore, the fact that the present claims were unexhausted at the time of the first federal habeas petition does

not constitute a defense against abuse of the writ charges.

In this case, the petitioner has abused the writ. The respondents have made a proper allegation of abuse, and the Court has held a hearing at which time the petitioner was afforded an opportunity to explain his alleged abuse. As noted above, the petitioner bore the burden of proof on the issue of his conscious decision to withhold claims, and he failed to meet that burden. The evidence which was presented to the Court tended to indicate that a conscious decision was made to withhold, for fear of dismissal under Rose v. Lundy, among other things. In addition, the petitioner's refusal to answer properly asked questions at the abuse hearing is also evidence that he did make a decision to withhold these claims deliberately. Finally, as noted above, the fact that

these claims were unexhausted when the first writ was filed does not constitute an excuse for abuse purposes as a matter of law. The petitioner has failed to demonstrate that his withholding of these claims was anything but deliberate, and his petition is therefore abusive.

IT IS THEREFORE, HEREBY ORDERED that the respondents' motion to dismiss the petition for writ of habeas corpus on abuse of the writ grounds is granted.

IT IS FURTHER ORDERED that the stay of execution entered in this matter by the Court shall remain in effect for thirty days from the date of this order, so that the petitioner may seek review of this order in the Ninth Circuit Court of Appeals. If no appeal is pursued, the stay shall expire at the end of that thirty-day period.

---

[1]As set forth fully below, the petitioner pursued his first petition for writ of habeas corpus before this Court in 1985. The Court will refer to this petition as the "1985 petition." This case therefore represents the petitioner's second attempt at federal habeas relief, and will be referred to as the "1987 petition."

[2]The petitioner's argument also requires the court to assume that it would have been impossible for him to have attained a stay in the state courts. The Court has not been presented with any case law or evidence which would tend to indicate that it would have been impossible for the petitioner to have gained a stay. Whereas it is true that the state courts refused to grant a stay on the petition filed in pro per, the reason for that refusal was the legal insufficiency of the petition. Had the petitioner presented the state courts with a proper petition, a stay could well have been achieved in the state courts.

The petitioner's argument also overlooks the fact that he could have amended the first federal habeas petition to include these claims once they were exhausted in the state courts. The petitioner could have even gone so far as to dismiss the first petition voluntarily, without prejudice, thereby allowing him more time to exhaust state remedies on these claims. Once all were exhausted, the petitioner could then return to this court with all of his claims in a single petition. The claim that the petition had to be pursued as it was originally constituted is thus not factually accurate.

APPENDIX G

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

Jimmy NEUSCHAFER, Petitioner/Appellant, vs. Harol WHITLEY, et al., Respondents/Appellees,	No. 88-1688

Order February 29, 1988

Dissent March 7, 1988

Order March 28, 1988

Before ALARCON and HALL, Circuit Judges.

ORDER

The order filed February 29, 1988 has been ordered for publication along with Judge Chambers [sic] dissent- filed on March 7, 1988.

ORDER

A stay of execution is ordered pending final disposition of this appeal.

The parties are directed to file simultaneous briefs within 28 days; within 14 days thereafter the parties may file simultaneous responses.

Circuit Judge CHAMBERS dissents from this order and will file a separate expression of his views.

CHAMBERS, Circuit Judge, dissenting:

My dissent on our Court's order for briefs is that I think we had such splendid oral presentations on February 29 that I think we have enough in the record to decide the issues before us without the briefing that was ordered.

APPENDIX H

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Jimmy NEUSCHAFER,	)
Petitioner/Appellant,	)
v.	)
Harol WHITLEY; Attorney General for the State of Nevada,	)
Respondents-Appellees.	)

No. 88-1688.

United States Court of Appeals,
Ninth Circuit.

Argued February 29, 1988.

Submitted May 6, 1988.

Decided November 3, 1988.

Before: CHAMBERS, ALARCON, and HALL, Circuit Judges.

CYNTHIA HOLCOMB HALL, Circuit Judge:

Jimmy Neuschafer appeals from the dismissal of his petition for writ of habeas corpus on abuse of the writ grounds. We reverse and remand.

I.

Jimmy Neuschafer was sentenced to death on April 12, 1983 for killing fellow inmate Johnnie Johnson. He appealed his conviction to the Nevada Supreme Court which affirmed it on August 27, 1985. Neuschafer v. State, 101 Nev. 331, 705 P.2d 609 (1985). On October 7, 1985 the state trial court held a hearing during which Neuschafer's counsel was relieved. No new counsel was appointed and the court set an execution date of November 5, 1985.

On October 22, 1985, with some assistance from the state public defender's office, Neuschafer filed a pro se state habeas petition, requested a stay of execution, and requested counsel. Neuschafer's state petition raised two issues: (1) Neuschafer's fifth and sixth amendment rights were violated because a confession was obtained after he requested counsel, and (2) there might be other

grounds that would come to light once a lawyer was appointed.

On October 24, 1985 the state trial court held a hearing on this petition at which Neuschafer was present. The court denied relief and dismissed the petition without prejudice because it was conclusory and because the first ground had been decided by the Nevada Supreme Court on direct appeal. The court cautioned Neuschafer that if he filed another petition he should raise all issues that challenged the validity of his sentence and conviction in that single petition; otherwise he would not be able to assert them in a subsequent habeas petition. See Nev. Rev. Stat. § 177.380 (1987).

At a hearing in the state trial court on October 30, 1985 a state public defender was appointed to represent Neuschafer at his request. Counsel asked for a 120 day stay of execution in order

to obtain the record, review it thoroughly, and determine what issues could be raised in a habeas petition. One issue that counsel believed existed was an ineffective assistance of counsel claim. At this hearing counsel acknowledged, in Neuschafer's presence, that the state trial court previously had informed Neuschafer "that each and every possible allegation and error must be raised in this petition or it is forever barred in the State court. And, of course, that would mean to be forever barred in going anywhere, because the Federal Court is going to look whether or not Mr. Neuschafer exhausted his State remedies." The state trial court denied the stay of execution.

A state public defender appealed from both the denial of the stay and the denial without prejudice of Neuschafer's pro se state habeas petition. At oral argument

before the Nevada Supreme Court, counsel argued the ineffective assistance of counsel claim without having amended Neuschafer's petition to raise the claim. On November 1, 1985 the supreme court denied the stay and dismissed the appeal without prejudice to Neuschafer filing an amended state habeas petition, as permitted by the state trial court's order.

Neuschafer did not return to the state trial court. Instead, on that same day and with some help from the federal public defender's office, Neuschafer filed a pro se federal habeas petition, moved for appointment of counsel, and requested a stay of execution. This petition raised only one ground: it challenged the admissibility of a confession Neuschafer made after he requested counsel.

The district court appointed a federal public defender to represent Neuschafer and held a hearing on November

4, 1985 to consider the application for a stay. Neuschafer was not present. At the hearing counsel expressed his belief that there were additional issues that might be raised in state court that had not been raised in the federal petition: "There are dozens of issues that could be raised pending a more complete review of the record by an attorney at law." Counsel specifically mentioned the availability of an ineffective assistance of counsel claim and that that claim had not been exhausted.

Counsel also suggested to the district court the possibility of holding the federal petition in abeyance, granting a stay of execution, and allowing a state public defender to develop in state court any additional unexhausted claims that the federal public defender found after reviewing the record.[1] In this way, counsel thought he could avoid what he

perceived as the problem of getting a stay from the state courts if Neuschafer returned there.

The district court was reluctant to issue a stay on the ground that a review of the record might disclose unexhausted issues. However, because Neuschafer's petition raised a facially valid constitutional claim, the district court granted a stay to deal with that issue. This allowed counsel to review the record for both exhausted and unexhausted claims without the threat of Neuschafer's imminent execution.

The district court also gave Neuschafer twenty-one days, until November 25, 1985, to file a supplemental federal petition to raise whatever other grounds for relief counsel could discern. The court cautioned counsel to raise all possible issues in the supplemental petition because Neuschafer might be

precluded from raising them in a later federal petition.[2] Furthermore, the court indicated that if a review of the record indicated that there were unexhausted issues, the court would determine at that point whether it could issue a stay while Neuschafer proceeded in state court.

On November 25, 1985 Neuschafer filed his supplemental federal petition which raised three grounds for relief, all of which had been presented to the Nevada Supreme Court on direct appeal: (1) his confession was obtained after he requested counsel, (2) insufficient evidence was presented to support the death sentence, and (3) the death sentence was a disproportionate penalty. The petition did not raise any of the unexhausted claims that counsel was sure existed on November 4, including the ineffective assistance of counsel claim. Notably, Neuschafer did not request that the district court issue

a stay and hold the federal petition in abeyance so he could return to state court to exhaust state remedies. The district court denied the federal petition on March 1, 1986. Neuschafer v. Whitley, 630 F. Supp. 897 (D. Nev. 1986).

Neuschafer appealed to this court and we remanded for an evidentiary hearing on the issue of his confession and whether he waived his right to counsel. Neuschafer v. McKay, 807 F.2d 839 (9th Cir. 1987). The district court held a hearing and made findings. Neuschafer v. Whitley, 656 F. Supp. 891 (D. Nev. 1987). We then rejected Neuschafer's constitutional arguments and affirmed the denial of the petition by the district court. Neuschafer v. Whitley, 816 F.2d 1390 (9th Cir. 1987). We also granted a stay of execution pending the filing of a petition for grant of certiorari by the Supreme Court. However, after a conscientious

review of the record, the federal public defender moved to withdraw the stay because he thought a petition would not be granted and could be viewed as a dilatory tactic.

Neuschafer then returned to the state trial court. On July 21, 1987 all attorneys who had represented Neuschafer were notified of a hearing to be held on August 4, 1987 regarding the issuance of a warrant of execution. At that August 4 hearing Neuschafer asked the state trial court to release all his previous counsel from further responsibility because "they have done enough for me, your Honor. They were my trial lawyers and they can't help me no further." After canvassing counsel and Neuschafer, the court released all prior counsel including the state public defender's office. Neuschafer's execution date was set for August 20, 1987.

On August 5, 1987, the day after he requested to have counsel relieved, Neuschafer filed a second pro se state habeas petition that raised a number of new grounds. He also requested that an attorney be appointed to represent him in the habeas proceedings. The state public defender was again appointed. On August 10 counsel requested a stay of execution because counsel was not familiar with the record and needed time to prepare a supplemental state petition after reviewing the record.

On August 17, 1987 the state trial court held a hearing. At Neuschafer's request the court removed the state public defender's office as counsel because of conflicts of interest. The court also dismissed Neuschafer's habeas petition without prejudice because it was conclusory. The court offered to appoint independent counsel, without any

connection to the state public defender's office, to assist Neuschafer with his appeal to the Nevada Supreme Court. Neuschafer replied, "I appreciate that, but it's not necessary."

On August 18, 1987, although expressly relieved from the case because of conflicts of interest, a state public defender filed a notice of appeal to the Nevada Supreme Court which included an affidavit stating the state public defender's belief that Neuschafer was not competent to discharge counsel, to waive appointment of other counsel, or to waive his appeal. The Nevada Supreme Court considered the appeal because of the gravity of the sentence, but dismissed it on August 19, 1987.

After vacillating on whether to request relief from federal court, Neuschafer filed a second federal habeas petition late in the evening on August 19,

1987, only a few hours before his 2:00 a.m. execution time. The district court granted a stay of execution. This second federal petition raised seven grounds for relief: (1) ineffective assistance of counsel, (2) failure to disqualify the trial judge, (3) failure to object to jury instructions, (4) failure to request change of venue, (5) failure to dismiss a juror, (6) failure to present mitigating circumstances at the penalty phase, and (7) inability to call witnesses on his own behalf.

On November 20, 1987 the district court held an evidentiary hearing to determine whether Neuschafer had abused the writ by bringing the claims in his second federal petition. The State called Neuschafer to the stand to explain why he did not raise these claims in his first federal petition. Neuschafer's attorney objected to him testifying on fifth

amendment grounds. The court determined that the fifth amendment did not apply and ordered Neuschafer to answer the questions asked him. Nevertheless, Neuschafer refused to answer questions about his knowledge of unexhausted claims when he filed his first federal petition. The district court dismissed this second petition on December 8, 1987 on the grounds that Neuschafer had abused the writ of habeas corpus. Neuschafer v. Whitley, 674 F. Supp. 1418 (D. Nev. 1987). The court denied a motion for reconsideration on January 12, 1988. Neuschafer appeals from the dismissal of this second federal habeas petition.

II.

We review for an abuse of discretion a district court's decision to deny consideration on the merits of a petition for habeas corpus because the petition is abusive or successive.[3] Sanders v.

United, 373 U.S. 1, 18-19 (1963); see Arellanes v. United States, 408 F.2d 1392, 1392 (9th Cir. 1969) (district court did not abuse its discretion in not considering successive petition on grounds that ends of justice would not be served by redetermination of the merits); Curry v. Wilson, 405 F.2d 110, 111 (9th Cir. 1969). A court abuses its discretion when it bases its decision on an erroneous legal conclusion or on a clearly erroneous finding of fact. Andrew v. Bowen, 837 F.2d 875, 877 (9th Cir. 1988).

Title 28 U.S.C. § 2244(b) and Rule 9 of the Rules Governing Section 2244 Cases, 28 U.S.C. foll. § 2244 codify the abuse of the writ doctrine. Richmond v. Rickets, 774 F.2d 957, 959 (9th Cir. 1985). We look to the Supreme Court decision in Sanders to determine what circumstances constitute an abuse of the writ. See Richmond, 774 F.2d at 961; Johnson v.

Lumpkin, 769 F.2d 630, 636 & n. 18 (9th Cir. 1985).

[1] A federal court need not consider habeas claims previously unlitigated in federal court if it determines that the petitioner (1) made a conscious decision deliberately to withhold them from a prior petition, (2) is pursuing needless piecemeal litigation, or (3) has raised the claims only to vex, harass, or delay. See Sanders v. United States, 373 U.S. 1, 18-19 (1962); Richmond v. Ricketts, 774 F.2d 957, 961 (9th Cir. 1985).

The district court determined that Neuschafer made a conscious decision deliberately to withhold unexhausted issues from his first federal habeas petition; therefore, the court decided not to hear Neuschafer's second federal habeas petition in which he raised those issues. The court noted that the evidence presented[4] tended to show that Neuschafer

chose deliberately to withhold claims from his first federal habeas petition because he had not yet exhausted them in state court. Neuschafer feared those claims would have been barred and his federal petition would have been dismissed for failure to exhaust state remedies.[5] 674 F. Supp. at 1422-25. Nevertheless, the court ruled that "the fact that these claims were unexhausted when the first writ was filed does not constitute an excuse for abuse as a matter of law." Id. at 1425. Accord Rudolph v. Blackburn, 750 F.2d 302, 305 (5th Cir. 1984); Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983) (en banc);

[2] In Tannehill v. Fitzharris, 451 F.2d 1322 (9th Cir. 1971), we specifically addressed this issue of whether withholding claims from an initial federal habeas petition because state remedies had not been exhausted could constitute a ground

for finding a deliberate abuse of the writ when a second petition was brought that raised those claims once they had been exhausted. In Tannehill, a petitioner brought a second federal habeas petition alleging sixteen grounds for relief. One ground was the subject of a previous petition and fifteen were new. The district court denied the petition because one claim had previously been adjudicated and the other fifteen were an abuse of the writ.

[3] We reversed on both grounds. We held that a petitioner does not "'deliberately' abuse the writ" within the meaning of Sanders if (1) he left claims out of a previous federal petition because he believed in good faith that his claims would be barred until he had exhausted state remedies, and (2) he brings these claims in a later federal habeas petition

after exhausting state remedies. Id. at 1323.

Tannehill thus changed the meaning of "deliberate" from a fact-specific definition to a legal one. By prohibiting a factual determination of a "deliberate abuse of the writ" when a petitioner proffers the excuse of "unexhaustion" for deliberately withholding claims from a prior federal petition, Tannehill allows individuals such as Neuschafer to engage in piecemeal litigation and to delay the imposition of their death sentences.

[4] Tannehill allows petitioners to exhaust their state remedies one by one and to bring a new federal habeas petition each time they exhaust a state claim. The decision does nothing to encourage a petitioner to make only one trip through each court system. Cf. Nev. Rev. Stat. § 177.380 (1987). Part of the reason the Ninth Circuit adopted a total exhaustion

rule was to avoid fragmented appeals in habeas cases. See Gonzales v. Stone, 546 F.2d 807, 809-10 (9th Cir. 1976). Fragmented appeals cannot be avoided unless petitioners who leave behind unexhausted claims for future federal petitions run the risk of forfeiting those claims.

[5] In Rose v. Lundy, 455 U.S. 509 (1981), the Supreme Court held that federal habeas petitions that contain both exhausted and unexhausted claims, "mixed" petitions, must be dismissed. Id. at 522. A petitioner who files a mixed petition may (1) amend the petition and proceed with only the exhausted claims, setting aside the unexhausted, or (2) have the petition dismissed without prejudice and return to state court to exhaust the unexhausted claims, and then return to federal court with all the claims for relief.

Justice O'Connor authored a plurality opinion in Rose, joined by Chief Justice Burger and Justices Powell and Rehnquist. Justice O'Connor wrote that a petitioner who proceeds in federal court only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions that raise those issues because those petitions could be considered an abuse of the writ under Sanders. In such a case, Justice O'Connor opined that the petitioner would have made a conscious decision deliberately to withhold those claims from the initial federal petition.[6] Id. at 520-21 (Section "C"). Justice O'Connor did not state that subsequent petitions must be dismissed; rather, in light of Sanders and Rule 9(b) a court would have discretion to dismiss them for abuse of the writ.

[6] In this case, the district court noted that there was evidence[7] that Neuschafer withheld from his first federal petition the claims in his second federal petition because he had not yet exhausted his state remedies and feared those claims would be barred by the total exhaustion rule of Rose v. Lundy. 674 F. Supp. at 1425.[8] The district court found the Rose plurality opinion persuasive and held that "the fact that these claims were unexhausted when the first writ was filed does not constitute an excuse for abuse purposes as a matter of law. Neuschafer has failed to demonstrate that his withholding of these claims was anything but deliberate, and his petition is therefore abusive." Id.

[7] The district court apparently was unaware of Tannehill, and neither party has brought this case to our attention. Instead, the district court

concluded, and the State of Nevada has argued on appeal, that the plurality opinion of Justice O'Connor is the better approach. Although our research reveals that all other circuits that have considered the issue have adopted the plurality opinion's approach,[9] we are not free to ignore Tannehill which is binding precedent.[10] We therefore hold, as a matter of law, that Neuschafer's claim that he did not bring the claims in his first federal petition because they were unexhausted and barred by Rose precludes a finding that he deliberately withheld those claims from his first federal petition and thereby abused the writ when he brought them in a second federal petition.[11] Tannehill, 451 F.2d at 1324.

We are aware of the problems that this result may create.

Neuschafer's petition raises seven claims, each of which was presented to the

Nevada Supreme Court. In dismissing Neuschafer's appeal, the Nevada Supreme Court rejected some of these claims on the merits as "belied by the record," and it rejected some as conclusory, unsupported by factual allegations, and without prejudice to renew them in a properly pleaded petition.[12] The district court will have to determine whether the supreme court's disposition of these claims amounts to an exhaustion of state remedies. If not, the district court may have before it a mixed petition.

[8] Under Rose v. Lundy, Neuschafer then may be allowed to amend his petition to delete the unexhausted claims. After he pursues all his federal remedies on the exhausted claims, he may decide to return to state court to exhaust his still unexhausted claims. He may then be able to file a third federal habeas petition. This cycle may continue. Indeed, as each

new execution date approaches, Neuschafer will have every incentive to think up new unexhausted claims in order to avoid the penalty which the jury imposed.

Although we recognize these potential problems, we are compelled by Ninth Circuit precedent to reverse the district court.

REVERSED AND REMANDED.

CHAMBERS, Circuit Judge, concurring:

Reluctantly, I concur.

When the case was here before, I dissented. Neuschafer v. McKay, 807 F.2d 839, 842 (9th Cir. 1987). That decision has become the law of the case.

I am sure that the majority did not foresee that counsel for the State of Nevada would seek to invoke "Abuse of the Writ."

On remand, the district court should be certain that the prisoner has exhausted

all of his points before the courts of Nevada and the Federal district court, except possibly the one that his present counsel has incompetently represented him which has not yet emerged. Surely he can't use that one more than four or five successive times.

In preparing for our first round, Neuschafer, 807 F.2d 839, I was worried that counsel seemingly did not bear down on the "buggery" that Neuschafer asserted was what provoked his deed. But that was before we found in the record his disgusting criminal record in the sex field when he was not in custody. When we found that, then I knew why his trial counsel chose to emphasize the weak Miranda point. The original trial record tells me that he was competently represented at his trial and that his trial counsel made a wise choice.

I repeat what Mr. Justice Douglas said in his dissent in Chessman v. Teets, 354 U.S. 156, 166-67 (1957):

> I agree that in a case like this it matters not whether the petitioner is guilty or innocent, whether his complaint is timely or tardy. We should respect a man's constitutional right whenever or however it is presented to us. My difficulty here is not with any principle the Court announces. My dissent is based on the conviction that, in substance, the requirements of due process have been fully satisfied, that to require more is to exalt a technicality.

ALARCON, Circuit Judge, concurring in the result:

I agree that we must reverse and remand this matter because the district court erred in ruling that Neuschafer abused the writ. I write separately to explain why I do not agree with the majority that our decision in Tannehill v. Fitzharris, 451 F.2d 1322 (9th Cir. 1971) necessarily "allows petitioners to exhaust their state remedies one by one and to

bring a new federal habeas petition each time they exhaust a state claim." Op. at 13710. I also suggest a procedure which, if followed by district courts, is fully protective of the petitioner's rights, consistent with our decision in Tannehill, and responsive to my colleague's concern that the law of our circuit appears to allow petitioners to file a judicially uncontrollable succession of petitions.

The issue we must resolve in this matter is whether a petitioner abuses the writ of habeas corpus by filing a petition in federal court before exhausting all his federal constitutional claims in state court, in a case where:

> (1) petitioner has acted expeditiously in seeking post-conviction relief from the state court;
>
> (2) the state's highest court has refused to stay the imposition of petitioner's death sentence and has refused to grant newly appointed counsel sufficient time to review the record to identify and exhaust

all of petitioner's federal constitutional claims; and

(3) petitioner is scheduled to be executed in four days.

This grave question arises from the following procedural history:

Neuschafer's conviction and sentence were affirmed by the Nevada Supreme Court on August 27, 1985. The remittitur issued on September 17, 1985. On October 7, 1985, the state trial court fixed an execution date of November 5, 1985. With no counsel to assist him, Neuschafer immediately prepared a pro se petition for writ of habeas corpus. He filed the petition in the state trial court on October 22, 1985. His moving papers included a request for the appointment of counsel to assist him in seeking state postconviction relief. On October 24, 1985, the state trial court denied Neuschafer's pro se petition without prejudice, and refused to appoint counsel, on the ground that the petition

failed to conform to the state's requirement that it allege specific facts which, if true, would entitle the petitioner to relief.

On October 28, 1985, with Neuschafer's execution date rapidly approaching, the public defender, on his own initiative and without court appointment, filed a motion in the state trial court for a 120-day stay of the execution date. In a supporting affidavit, the public defender advised the state trial court that Neuschafer had yet to receive the assistance of counsel in reviewing the trial record to determine whether any meritorious constitutional claims could be raised in state postconviction proceedings.

On October 30, 1985, the state trial court denied the motion for a stay of execution. On the same day, less than a week before the November 5, 1985 execution

date, the state trial court appointed the state public defender to represent Neuschafer.

The state public defender immediately appealed the state trial court's ruling denying a stay of the imposition of the extreme penalty to the Nevada Supreme Court. On November 1, 1985, two days after the state trial court had denied Neuschafer's motion for a continuance and a stay of his scheduled execution date, the Nevada Supreme Court refused to stay the execution and dismissed the appeal. Later that same day, Neuschafer filed his first federal petition for writ of habeas corpus.

The federal petition alleged one constitutional claim -- that state law enforcement officers violated Neuschafer's privilege against self-incrimination when they proceeded to interrogate him notwithstanding his request for counsel. The

petition was accompanied by motions for the appointment of counsel and for a stay of execution.

On November 4, 1985, the district court stayed the scheduled execution, appointed the federal public defender to represent Neuschafer, and granted Neuschafer until November 25, 1985 to file an amended petition alleging all claims that could be raised in federal court. On November 25, 1985, counsel filed in the district court a supplemental petition for habeas corpus realleging Neuschafer's claim of unconstitutional police interrogation. The supplemental petition also presented the remaining constitutional claims that Neuschafer had earlier exhausted on direct appeal to the Nevada Supreme Court.

No unexhausted claims of federal constitutional error were included in the supplemental petition. The supplemental

petition, thus, complied with the rule that federal habeas petitions allege only claims that have been exhausted in state court. See 28 U.S.C. § 2254(b) (1982) (petition shall not be granted unless applicant has exhausted state remedies that are available and effective in protecting applicant's rights); Rose v. Lundy, 455 U.S. 509, 515 (1982) ("state remedies must be exhausted except in unusual circumstances"). The record is silent as to whether Neuschafer or his attorney knew of any unexhausted federal constitutional claims prior to the filing of the supplemental petition in the district court.

The law is clear that a finding of abuse of the writ is warranted only when the petitioner has deliberately and knowingly withheld certain claims for the purpose of gaining successive hearings. The Court addressed this point in some

detail in Sanders v. United States, 373 U.S. 1 (1963). The Court stated:

> [F]ull consideration of the merits of the new application can be avoided only if there has been an abuse of the writ. . . . Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground.

Id. at 17-18 (emphasis added).

Congress codified the Sanders holding in Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254 (1982) [hereinafter Rule 9(b)]. Rule 9(b) provides: "A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and

different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." The Advisory Committee Note explains that Rule 9(b) "requires that the judge find petitioner's failure to have asserted the new grounds in the prior petition to be inexcusable." Rule 9(b) Advisory Committee Note (emphasis added).

In Rose v. Lundy, the Supreme Court held that a "mixed" habeas petition, i.e., a petition alleging both exhausted and unexhausted claims, must be dismissed by the district court. 455 U.S. at 522. Justice O'Connor observed, in dictum, that "a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions." Id. at 521. A plurality of the Court concurred in this dictum. Four

other justices, however, suggested that a second petition alleging new claims should not be dismissed on the ground of abuse of the writ unless petitioner deliberately withheld the claims, for an improper purpose, from his first petition. See id. at 529 (Blackmun, J., concurring in the judgment) ("[S]ubsequent petitions may be dismissed, as Justice BRENNAN observes, only if the prisoner has 'abused the writ' by deliberately choosing, for purposes of delay, not to include all his claims in one petition."; id. at 536 (Brennan, J., joined by Marshall, J., concurring in part and dissenting in part) ("Sanders made it crystal clear that dismissal for 'abuse of the writ' is only appropriate when a prisoner was free to include all of his claims in his first petition, but knowingly and deliberately chose not to do so in order to get more than 'one bite at the apple.'"); id. at 538 (White, J.,

concurring in part and dissenting in part) ("[I]f the judge rules on those issues that are ripe and dismisses those that are not, I would not tax the petitioner with abuse of the writ if he returns with the latter claims after seeking state relief.").

If Rose v. Lundy left any doubt concerning the standard to be applied in determining whether withholding of claims constitutes abuse of the writ, this court resolved the doubt in Richmond v. Ricketts, 774 F.2d 957 (9th Cir. 1985). We declared: "Previously unadjudicated claims must be decided on the merits unless the petitioner has made a conscious decision deliberately to withhold them, is pursuing 'needless piecemeal litigation,' or has raised the claims only to 'vex, harass, or delay.' See Sanders, 373 U.S. at 18." Id. at 961 (parallel citation omitted).

As the majority correctly notes, our decision in Tannehill indicates that a petitioner may not be charged with making "a conscious decision deliberately to withhold" a claim if the reason for the withholding is a concern that inclusion of the claim will prompt the federal court to dismiss the entire petition. We stated in Tannehill:

> [T]he district district [sic] court found the petition an abuse of the writ . . . . [I]t appears that Tannehill was seeking collateral relief from the state courts, which was finally denied only a few months before he filed this petition. It may be that he believed in good faith, perhaps correctly, that his [unexhausted] claims for federal relief would have been barred until that time by failure to exhaust state remedies. If so, he did not "deliberately" abuse the writ. See Sanders, supra; Wong Doo v. United States, 265 U.S. 239 (1924).

451 F.2d at 1324 (parallel citation omitted).

The decision in Rose v. Lundy instructs attorneys and petitioners that they should not file habeas petitions in federal court alleging claims that have yet to be exhausted in state court. In light of Rose v. Lundy, therefore, petitioners always have a valid reason for withholding unexhausted claims from a federal habeas petition -- inclusion of the claims will render the petition "mixed" and mandate its dismissal. Our decision in Tannehill properly holds, in effect, that attorneys and petitioners will not be vulnerable to charges that they have abused the writ merely because they have complied with the requirement of Rose v. Lundy that unexhausted claims be withheld from habeas petitions presented to the federal courts.

A petitioner who is able, prior to his execution date, to identify and exhaust all his federal claims before

filing his initial habeas petition in federal court can readily comply with Rose v. Lundy.

In Tannehill, we concluded that the mere fact that a state prisoner files an exhausted claim in federal court prior to exhausting all of his federal constitutional claims in state court is not sufficient, standing alone, to show an abuse of the writ. Our decision in Tannehill does not preclude a finding of abuse of the writ under such circumstances, however, if the record shows that the petitioner was not acting in good faith or was deliberately seeking to present his claims in a piecemeal fashion.

A state prisoner who (1) has been denied a continuance to exhaust all of his claims in the state court, and (2) faces execution in four days, has no practical choice but to seek a stay from the federal court before the executioner makes moot

his right to a trial free of constitutional error. As noted above, section 2254 and Rose v. Lundy require the petitioner to limit his allegations to claims that have been exhausted in state court. The holding in Rose v. Lundy, however, provides no guidance to a person faced with Neuschafer's life or death option after his requests for time to exhaust his claims have been denied by the state's highest court.

The record in the matter now before us demonstrates that Neuschafer had a valid, indeed compelling, reason for filing his first federal petition before exhausting all his claims -- his execution was imminent, and the state court had refused to grant a stay of execution to permit his counsel to review the record and to exhaust any remaining claims. See Richmond, 774 F.2d at 960, 961 (petitioner was "compelled" to file second federal

petition when he was resentenced to death following successful attack on death penalty statute in his first petition; petitioner's purpose in filing second petition was not solely to vex, harass or delay, where he "challenged the reimposition of his sentence in a good faith attempt to avoid the penalty of death"). Given the imminence of his scheduled execution, the only way Neuschafer could assure himself a hearing in federal court on his constitutional claims was by immediately filing a habeas petition.

Neuschafer's petition properly alleged only those claims that had already been exhausted. Allegation of other claims would have been a completely idle act, since Neuschafer would have had to amend the petition to delete such claims. See Rose v. Lundy, 455 U.S. at 520, 522 (district courts must dismiss petitions alleging both exhausted and unexhausted

claims; petitioner "can always amend the petition to delete the unexhausted claims," then resubmit it). Because he faced death if he did not proceed with his exhausted claims, Neuschafer had no alternative but to act precisely as he did.

Under the perilous circumstances facing Neuschafer when he filed his original petition in the district court, Neuschafer did not abuse the writ in pursuing his exhausted claims prior to identifying and exhausting his remaining federal constitutional claims. Accordingly, when counsel later discovered and exhausted additional federal constitutional claims, he did not abuse the writ in filing a second federal petition alleging the subsequently exhausted claims.

This is not a case in which the petitioner intentionally elected not to

seek postconviction relief until long after the affirmance of his conviction on direct appeal. Cf. Antone v. Duggar, 465 U.S. 200, 206 n.4 (1984) (per curiam) (although counsel was appointed to prepare federal habeas petition "when execution was imminent" and had little time to familiarize himself with the case, omission of exhausted claims from petition was inexcusable because petitioner inexplicably "allowed almost two years to elapse between the affirmance of his conviction and the filing of his first motion for postconviction relief in the state courts"). When a petitioner has ample time to seek collateral relief but inexplicably waits until the eve of execution to do so, he should not be heard to complain that time constraints prevented his counsel from identifying and exhausting all claims in time to include them in a single federal habeas petition.

The procedural history of this case, as summarized at the outset of this opinion, readily refutes any suggestion that Neuschafer has pursued "needless piecemeal litigation" or has acted with the intent to "vex, harass, or delay." The severely limited time constraints under which the state public defender was forced to work resulted, not from any dilatory tactics on Neuschafer's part, but from the Nevada Supreme Court's refusal to grant newly appointed counsel's request for a reasonable continuance and a stay of execution. Had the Nevada Supreme Court granted Neuschafer's counsel a reasonable opportunity to review the trial record, he could have filed one federal habeas corpus petition after identifying and exhausting Neuschafer's remaining federal constitutional claims in state court.

The majority suggests that because the district court granted Neuschafer's

newly appointed federal counsel 21 days within which to supplement Neuschafer's pro se petition, there is no merit to the argument that the press of time prevented counsel from identifying potential constitutional claims. See Op. at 1476 n.11. I respectfully disagree. The state public defender had previously indicated to the state court that 120 days would be needed to complete a thorough review of the record. Assuming that this was a reasonable request (nothing in the record suggests otherwise), the 21-day extension granted to the federal public defender seems, in contrast, totally inadequate. In any event, counsel is surely entitled to more than 21 days within which to review the entire trial record in a capital case for constitutional errors, file a supplement to the pending petition, and prepare for an evidentiary hearing in

the district court in a case where, as here, his client faces death.

Even assuming that 21 days was a sufficient length of time within which to review the record, I do not agree with the implication in the majority's opinion that counsel was under a duty to alert the court to the existence of any unexhausted claims and to request that the federal proceedings be held in abeyance pending exhaustion of such claims in the state system. See Op. at 1474 n.5, 1476 n.8, 1476 n.11. The district court granted counsel 21 days within which to file a supplemental petition alleging all the claims that could then be raised in federal court. Counsel fully complied with the court's direction. If, at the conclusion of the 21-day period, counsel was aware of any unexhausted claims, he properly omitted them from the supplemental petition. Inclusion of such claims

would have mandated dismissal of the "mixed" petition, and thus termination of the stay of execution, pursuant to Rose v. Lundy. Surely counsel cannot be faulted for pursuing the only course of action through which Neuschafer could hope to obtain a stay of execution and a hearing on his exhausted claims.

The problem presented in this case could have been avoided if the district court, in granting a 21-day extension, had directed Neuschafer's counsel to review the record and to inform the court whether any claims remained unexhausted. The court could then have given Neuschafer the choice of either abandoning such unexhausted claims or requesting that the federal proceedings be held in abeyance until such time as the claims had been exhausted in the state system. Had the court "flushed out" the unexhausted claims

in that manner, Neuschafer's second petition would have been unnecessary.

In future cases such as this -- where a petitioner is compelled to file a habeas petition alleging exhausted claims at the eleventh hour, because the state court has refused to grant counsel sufficient time to exhaust all claims in state court -- the district court can avoid the filing of a subsequent petition by issuing an order requiring the prisoner's counsel, within a reasonable time, to review the trial record and inform the court whether there are any other exhausted or unexhausted claims. The court should then given petitioner the choice of abandoning the unexhausted claims or exhausting them in state court before proceeding with a hearing on all exhausted claims.

Adherence to this procedure will eliminate the possibility that petitioners will "exhaust their state remedies one by

one and . . . bring a new federal habeas petition each time they exhaust a state claim." Op. at 1475. Once counsel has disclosed to the court all exhausted claims, the court may require the petitioner either to amend the pending petition to include such claims or to abandon them on the record. Similarly, once counsel has disclosed all unexhausted claims, the court may require the petitioner to exhaust them in the state system or to abandon them on the record. The court need not hold a hearing on the pending petition until all disclosed claims have been either exhausted or abandoned on the record.

If this procedure is followed, the filing of a second petition alleging a new federal constitutional claim will be inexcusable, and an abuse of the writ, unless petitioner is able to allege a change in the law, a newly discovered

fact, or ineffective assistance of counsel in connection with the first petition.

For the foregoing reasons, I concur in the decision to reverse the district court's order dismissing Neuschafer's second petition. I would remand this matter with instructions that the district court hold an evidentiary hearing to determine whether Neuschafer or his counsel knowingly withheld unexhausted claims from the supplemental petition filed November 25, 1985 with the intent to engage in "needless piecemeal litigation" or "to vex, harass or annoy."

Footnotes

[1]When a petitioner has not exhausted his state remedies before filing a federal habeas petition, a district court may hold the federal petition in abeyance, issue a stay of execution, and allow the petitioner an opportunity to exhaust his state remedies. E.g., Blair v. California, 340 F.2d 741, 745 (9th Cir. 1965); Duffy v. Wells, 201 F.2d 503, 504 (9th Cir. 1953); Tinder v. Paula, 725 F.2d 801, 805 (1st Cir. 1984); Collins v. Lockhart, 707 F.2d

341, 342, 344 (8th Cir. 1983); Modesto v. Nelson, 296 F. Supp. 1375, 1376 (N.D. Cal. 1969).

[2]The court's written order of November 4, 1985 echoed a similar warning.

[3]Although courts often use the terms "abusive" and "successive" interchangeably, there is an important difference between abusive and successive petitions. An abusive petition raises grounds that were available but not raised in an earlier petition. A successive petition raises grounds identical to those raised in a prior petition. See Kuhlman v. Wilson, 106 S. Ct. 2616, 2622 n.6 (1986). Moreover, there are different standards that determine when a court may dismiss a petition as abusive and when it may dismiss one as successive. See Sanders, 373 U.S. at 15-19.

[4]Neuschafer presented no documentary evidence and called no witnesses at the evidentiary hearing on November 20, 1987. Instead, he relied on "the evidence and testimony presented in the voluminous records of [his] first habeas corpus petition." 674 F. Supp. at 1421.

When called to the stand to explain his state of mind when he filed his first federal habeas petition, Neuschafer's counsel objected on the basis of the fifth amendment. The court ruled that the fifth amendment did not apply and ordered Neuschafer to respond to the State's questions. Neuschafer refused to answer any questions.

[5]Although he initially suggested this option to the district court, Neuschafer never asked the court to issue a stay,

hold the federal petition in abeyance, and allow him to return to state court to exhaust his state remedies.

[6]The Court split 4-4-1 on this issue.

In his partial concurrence and partial dissent, Justice Brennan argued that a petitioner who is not permitted to proceed with his unexhausted claims by the total exhaustion rule of Rose has not made a "deliberate" decision not to proceed with those claims. See 455 U.S. at 536-37 (Brennan, J., concurring in part and dissenting in part). This reasoning is similar to this court's conclusion in Tannehill.

[7]See supra note 4.

[8]As we noted before, Neuschafer failed to ask the district court to issue a stay, hold the federal petition in abeyance, and allow him to return to state court to exhaust his state remedies.

[9]The Fifth, Eighth, Tenth, and Eleventh Circuits all have adopted Justice O'Connor's approach. See Rudolph v. Blackburn, 750 F.2d 302, 305 (5th Cir. 1984); Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983) (en banc); Jeffers v. Sargent, 842 F.2d 1008, 1009 n.2 (8th Cir. 1988), Dukes v. Wainwright, 769 F.2d 504, 506 (8th Cir. 1985); Purnell v. Missouri Department of Corrections, 753 F.2d 703, 710 (8th Cir. 1985); Jones v. Hess, 681 F.2d 688, 695 (10th Cir. 1982); Smith v. Atkins, 678 F.2d 883, 884 (10th Cir. 1982); McCorquodale v. Kemp, 832 F.2d 543, 545-46 (11th Cir. 1987); Arango v. Wainwright, 716 F.2d 1353, 1355 (11th Cir. 1983). Cf. Robinson v. Fairman, 704 F.2d

368, 370 n.5 (7th Cir. 1983) (declining to address the question of what constitutes abuse of the writ); Guthrie v. Warden, 683 F.2d 820, 821 n.1 (4th Cir. 1982) (same).

The district courts, however, appear to be split on whether to adopt Justice O'Connor's approach. See, e.g., cases collected in Jones v. Estelle, 722 F.2d 159, 169 n.11 (5th Cir. 1983) and in Neuschafer v. Whitley, 674 F. Supp. 1418, 1424 (D. Nev. 1987).

[10]Two Ninth Circuit cases have discussed in dicta the plurality opinion in Rose v. Lundy.

In Powell v. Spalding, 679 F.2d 163 (9th Cir. 1982), we suggested that although the issue was not before us, if and when the petitioner filed a second petition he would not be barred by the abuse of the writ doctrine from raising previously unexhausted claims because of the unique circumstances of the case. Id. at 165 n.2.

In Szeto v. Rushen, 709 F.2d 1340 (9th Cir. 1983), we remanded a mixed petition instead of allowing the petitioner to abandon an unexhausted issue on appeal because abandonment is a serious choice, and under Rose the petitioner may risk forfeiting later consideration of unexhausted claims in federal court. Id. at 1341.

[11]Neuschafer also claimed that he was under "duress" when he filed his first federal petition on November 1, 1985: he could either file a petition with only unexhausted claims and get a stay of his November 5 execution from federal court,

or he could return to state court to exhaust state remedies and run the risk of not getting a stay. Neuschafer claims that his situation was exceptional and that it should prevent a determination that he abused the writ when he omitted unexhausted claims from his first federal petition.

His argument fails to address the fact that the district court appointed counsel, granted a stay of execution, and allowed Neuschafer twenty-one days in which to file a supplemental petition raising all his claims for relief. Whatever urgency was present when Neuschafer filed his pro se petition on November 1 was not present in the time counsel had to file the supplemental petition.

Furthermore, after having twenty-one days to review the record, Neuschafer did not request that the district court hold the federal petition in abeyance and issue a stay to allow him to return to state court to exhaust state remedies.

Moreover, Neuschafer's claim that a stay from the federal court was more likely than one from the state courts is supported only by the fact that the district court granted a stay although the state courts had denied one. Neuschafer fails to point out that he presented the federal court with a facially valid claim on which to grant a stay. In contrast, Neuschafer presented the state courts only with unsupported, conclusory claims. The district court declined to grant a stay merely because a review of the record might reveal other claims, just as the state courts had.

[12]The Nevada Supreme Court's November 19, 1987 order is ambiguous. The Nevada Attorney General's office requested that the court clarify whether the court dismissed Neuschafer's second state petition with prejudice, or whether it reviewed the merits of Neuschafer's claims. In a November 20 order the court declined to clarify its order because the court determined the order was sufficiently clear.

APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JIMMY NEUSCHAFER,	)	
	)	No. 88-1688
Petitioner-Appellant,	)	
	)	D.C. No. CV-
v.	)	87-0419-ECR
	)	
HAROL WHITLEY;	)	O R D E R
	)	
ATTORNEY GENERAL FOR THE STATE OF NEVADA,	)	
	)	
Respondents-Appellees.	)	
	)	

Before: CHAMBERS, ALARCON and HALL, Circuit Judges.

The full court has been advised of the suggestion for rehearing en banc, and a majority of the judges of the court has voted against it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX J

28 U.S.C. § 2244(b):

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice of judge of the United States unless the application alleges and is

predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

APPENDIX K

Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts:

> Successive Petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.